UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10

AMAZON.COM SERVICES LLC,	)	
Employer,	)	
and	)	Case No. 10-RC-269250
RETAIL, WHOLESALE AND DEPARTMENT STORE UNION,	)	
Petitioner.	)	

EMPLOYER'S POST-HEARING BRIEF

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I. INTRODUCTION

Petitioner Retail, Wholesale and Department Store Union ("RWDSU" or the "Union") seeks a rerun of a seven-week, mail-ballot election that it lost by more than 1,000 votes. Both sides had a full and fair opportunity to persuade the electorate, and the voters overwhelmingly sided against exclusive representation by the Union, which received only 29% of the counted vote. Rather than accept this resounding defeat, the Union raised 23 objections based on the premise that without the alleged objectionable conduct, it could have prevailed in the election and thus a rerun is warranted. The Region allowed the Union to make its case at a hearing on 22 of the 23 objections, but the evidence showed that none of the Union's objections, individually or in combination, provides a basis to set aside the will of the voters.[1]

Ironically, most of the Union's case targets Amazon's extensive efforts to encourage turnout and make mail-in voting easier. Such efforts to *promote* voting should be encouraged, especially given the dismal turnout that often results in National Labor Relations Board ("NLRB" or "Board") mail-ballot elections. In particular, the Union objects to Amazon's request that the United States Postal Service ("USPS") install a secure mailbox outside the entrance of the BHM1 Bessemer, Alabama fulfillment center, which provided an additional option besides the more than 200 USPS mailing locations within a 20-mile radius of BHM1 for employees to mail in their completed ballots. Providing an additional convenient USPS-controlled mailing option is hardly grounds for overturning such a decisive election, especially where the Union has provided no evidence that the particular mailbox was widely used.

[1] Before the hearing, the Region determined that the Union's Objection 21 and part of Objection 20 raised unfair labor practice allegations that should be decided in a separate proceeding and held in abeyance. Then, after the hearing, the Union withdrew Objections 8, 9, 12, 16, 18, and 22 on June 2, 2021. Because these objections have been withdrawn or held in abeyance, this brief does not address them.

The Union also objects to Amazon's Get Out The Vote efforts during the voting period, which included instructions on proper completion of a mail ballot and distributing NLRB contact information for ballot issues. But none of these arguments can carry the day, for at their core they contradict "the Board's goal of ensuring maximum voter participation." *See In re Baker Victory Servs., Inc.*, 331 NLRB 1068, 1070 (2000). Again, Amazon should be praised, not condemned, for pursuing the same goal of promoting turnout the Board shares. The premise behind the Union's complaint is that efforts to encourage voter participation undermined the legitimacy of the election. The Region should reject that anti-democratic theory as forcefully as the voters rejected the Union's campaign message.

Beyond its mailbox-related objections, the Union's assorted other complaints fare no better. A pair of objections challenge Amazon's communications during the campaign. But these campaign-communications objections ignore that Amazon's messaging, frankly ordinary messaging for employers in union campaigns, was well within the limits of campaign speech—speech the Board is not directed to "police" through post-election objections. The Union also advances a pair of objections challenging Amazon's campaign activities, alleging that Amazon improperly polled and interrogated employees about their views of the Union or treated Union supporters worse than other employees. But the evidence provided no support for these campaign-activities objections. That leaves the Union grasping at straws in its remaining objections to the timing of the green light outside the BHM1 parking lot and the presence of off-duty police officers in the parking lot for security reasons. Here, too, the evidence proved the Union overpromised and underdelivered, given what it alleged in the objections.

Critically, none of these objections helps the Union prove what it must prove here: that without the challenged conduct, the outcome of this election might actually have been different.

In reality, the Union had every opportunity to make its arguments to the voters, with over four months to campaign after filing its petition and even more time before that. It created a constant, unprecedented flow of pro-union campaigning, through signs, celebrity and politician endorsements, a frequently updated website (http://www.bamazonunion.org/), and a prolific social media presence. In the end, the voters simply rejected what the Union claimed to offer by over a 2-1 margin. The Region should honor that outcome of this hard-fought campaign and certify the election results. Accepting the Union's objections and forcing the government and parties to do the election all over again based on the petition filed last year amounts to disrespect of the voters' clear choice. It would also waste important government and party resources, especially where the Union will be free to file a new petition in the coming months.

II. FACTUAL BACKGROUND

A. Procedural History.

On November 20, 2020, the Union filed its petition seeking to represent certain employees at Amazon's BHM1 fulfillment center. A pre-election hearing occurred via videoconference from December 18, 2020 to December 22, 2020 before Region 10 Hearing Officer Kerstin Meyers. On January 7, 2021, the parties filed post-hearing briefs, in which Amazon argued that if an election were directed by the Acting Regional Director, the election should be a manual election, not a mail-ballot election. Ex. J-4.[2] Amazon's brief also proposed certain protocols to enable the Region to conduct a manual election safely despite the COVID-19 pandemic. *Id.* at 28–29, 85–94, 114, 125. Those protocols included, among others, the use of pass-through boxes and "vending-style distribution" of manual ballots that minimized any risk of

[2] References to the Hearing Transcript are in the form of "Tr. __," references to the Board Exhibits are in the form of "Ex. B-__," references to Joint Exhibits are in the form "Ex. J-__," references to the Employer's Exhibits are in the form of "Ex. E-__," and references to the Union's Exhibits are in the form of "Ex. U-__."

surface transmission of the virus. *Id.* Alternatively, Amazon proposed, among many other things, that if the Board were to direct a mail-ballot election, the Board install an NLRB-controlled ballot drop box at BHM1 to encourage voter turnout. Ex. J-4 at 75–76.

On January 15, 2021, the Acting Regional Director of Region 10 issued a Decision and Direction of Election ("D&DE") directing a mail-ballot election conducted through the United States mail. Ex. J-1. In rejecting Amazon's manual-election proposal, the D&DE stated:

> [T]he use of the Employer's digital "Distance Assistant" or human social distancing team to monitor the line leading to the voting tent would give the impression of surveillance or tracking. The use of equipment clearly belonging to the Employer, such as pass-through boxes or vending machines, likewise implies a problematic amount of Employer involvement in election proceedings.

Id. at 9. The D&DE did not address or respond to any of Amazon's mail-ballot proposals, including Amazon's suggestion of a Board-controlled mail-ballot drop box.

The D&DE required that the mail ballots be mailed to the eligible voters on February 8, 2021, and that ballots be received by the Regional office by March 29, 2021. *Id.* at 10.

The ballots were counted between March 30, 2021 and April 9, 2021. Out of approximately 5,867 eligible voters, 1,798 voters cast ballots against representation by the Union and only 738 cast ballots for representation by the Union. Ex. B-1(a). The parties challenged a total of 505 ballots. *Id.*

On April 16, 2021, the Union filed 23 objections to conduct allegedly affecting the results of the election. Ex. B-1(b). The Acting Regional Director set 22 of the 23 objections for a hearing. Exs. B-1(f), B-1(j). That hearing took place by videoconference on various days from May 7, 2021 to May 26, 2021.

B. Before the Election, the USPS Installed a Mailbox in the BHM1 Parking Lot.

1. The USPS, in Response to Amazon's Request, Installed the Mailbox at BHM1 and Maintained Access to the Outgoing Mail Compartment.

The USPS first received a request from Amazon to install a mail collection point at BHM1 in late December 2020. Tr. 930 (Jay Smith). In early January 2021, an Amazon representative emailed the USPS to confirm that Amazon wanted to move forward with putting a collection box at BHM1. Tr. 931 (Jay Smith). At the time, there was no USPS mailbox at or in close proximity to the BHM1 facility. The USPS initially approved the installation of a standard blue USPS mailbox, but later the USPS suggested to Amazon that it install a cluster box unit instead. Tr. 864, 867 (Jay Smith). The USPS chose an old cluster box unit in the USPS's inventory. It modified the box to accommodate an increased amount of outgoing mail. Tr. 874 (Jay Smith).

On February 3, 2021, a USPS representative visited the facility and met with Amazon's Procurement Operations Analyst at BHM1. Tr. 976 (Harris). The USPS representative determined where the USPS would install the mailbox. Tr. 978 (Harris). The USPS installed the mailbox on February 4, 2021 during the day in public view. Tr. 981–82 (Harris). After installing the mailbox, the USPS provided Amazon two identical keys, which open only incoming mailbox compartment #1. Tr. 985–86 (Harris). USPS never gave Amazon the key to the outgoing mail compartment, which was labeled "1P." Tr. 988 (Harris), 909–11 (Jay Smith). The modified outgoing mail compartment contained a lock accessible only by the USPS and only by using an arrow key. Tr. 855, 866, 909 (Jay Smith); Tr. 1409 (Rhoten-Coleman). The mailbox was then functional and available for anyone to drop off any kind of mail, not just mail ballots. Tr. 879 (Jay Smith). The mailbox still operates that way today. Tr. 879 (Jay Smith); Tr. 1813 (Thompson).

2. Amazon Erected a Tent Around the Mailbox to Ensure the Privacy of Those Using the Mailbox.

Shortly after the installation of the USPS mailbox in February 2021, an Employee Relations ("ER") representative noted that some of BHM1's preexisting security cameras faced the mailbox, so Amazon put up a privacy tent around the USPS mailbox to ensure the anonymity of anyone using the mailbox and avoid even the appearance of surveillance. Tr. 1005 (Harris). The cameras predated the mailbox. Tr. 1202 (Street). The tent covered the mailbox on three sides and the only opening faced toward the parking lot, away from the building and cameras. Tr. 1210–11 (Street). The tent shielded the mailbox from view and no cameras could see inside. For a period of time (left unproven by the Union), a sign or a banner was placed on the outside of the tent. The sign on the tent encouraged employees to "speak for yourself" and to "mail your ballot here." Ex. E-6.

There are security cameras attached to the front of the BHM1 building. Amazon has not installed any new cameras on the front of the building since March 2020, nor did it move or redirect any cameras during the critical period. Tr. 1202, 1279 (Street). The cameras' appearance also has not changed in any way. The cameras do not have the ability to pan or tilt—their view is fixed. They do have the ability to zoom, but the picture becomes pixelated and blurry. Any camera footage captured remains accessible only for 14 days. A typical person would have no way of discerning which way a camera is facing or what a camera is doing because the camera is covered by a tinted mount/globe. Tr. 1202–03 (Street); Ex. E-43. There are no security cameras in the parking lot itself (including on any of the poles or signs), nor any cameras on the property's exterior facing inward or at ground level. Exs. E-45, E-46, E-47.

The USPS mailbox sits about 135 feet from the front of the facility. Tr. 1210 (Street). None of the facility's cameras could see inside the mailbox tent, which was open on one side facing away from the building. Ex. E-42.

After the mailbox was installed, BHM1's Loss Prevention ("LP") Manager Robert Street directed the LP and Allied Security teams to not use any of the cameras capturing the tent unless specifically authorized to do so. Between February 8 and March 29, there was no reason to use those cameras or save footage from those cameras. Tr. 1221–23 (Street).

No LP specialist or security officer was stationed at or near the mailbox. Tr. 1223–24 (Street). After the tent was installed, moreover, Amazon explicitly instructed managers not to use the tent or go near the tent. Tr. 1225 (Street); Ex. E-40.

3. <u>During the Campaign, Amazon Made Clear to Employees That the Mailbox Was Just One Option for Mailing Their Ballots.</u>

No Amazon manager, supervisor, or agent, pressured, coerced, or solicited employees to use the USPS mailbox outside the facility to mail their ballots. Employees had the option to use the mailbox, or not, throughout the election period, as reflected by the fact that, of the 17 employees who testified, *not one stated that he or she actually used the mailbox during the election*. No employee was ever disciplined or threatened for using or not using the USPS mailbox outside of the BHM1 facility. Tr. 142 (Richardson). Amazon also told employees that the mailbox was secure and that only the USPS had access to outgoing mail, including any ballots that employees chose to deposit into the outgoing mail slot. Tr. 865–66, 908–10, 952–53 (Jay Smith); Tr. 987–89, 993–94 (Harris); Tr. 1406–11, 1413–15, 1430–32 (Rhoten-Coleman). Amazon did not suggest that the *only* secure mailbox was the one outside BHM1; rather, it specifically informed employees of how to find other secure USPS mailboxes, including by directing them to the USPS's website. Tr. 361 (Wallace); Exs. E-1, U-7.

C. Both Parties Vigorously Campaigned and Communicated Their Messages to the Voters.

The Union's campaign began well before Amazon's campaign and ran for about 5 months. From October 20, 2020 to March 29, 2021, the Union stationed organizers at the BHM1 entrances and exits. Tr. 555–56 (Brewer). The Union handed out leaflets and collected authorization cards outside the facility. And it posted signs and other banners around Powder Plant Road with campaign messages such as "Vote Yes" and "Stronger Together." Tr. 686 (Brewer). On January 20, 2021, the Union received the voter list with emails, phone numbers, and home addresses for all eligible voters. Tr. 659 (Brewer). The Union also used other methods to campaign, including texting, emailing, and traditional mailing. Tr. 659–62 (Brewer). It held small group meetings with employees throughout the campaign and used Zoom and other video formats as well. Tr. 664 (Brewer). And it communicated through social media (for example, Facebook, Twitter, and Instagram), held rallies, and participated in media interviews. Tr. 594, 700–01 (Brewer). The communications addressed such issues as dues, collective bargaining, and strikes. One of the Union's messages was a guarantee that there would be "no loss of wages or benefits as a result of voting for the union." Tr. 168 (Richardson); Tr. 1159 (Logan); Ex. E-7. In addition, the Union broadcast messages of support from high-profile political figures, celebrities, and athletes, including President Biden; Senator Bernie Sanders; Representatives Andy Levin, Cory Bush, Terri Sewell, and Jamaal Bowman; Danny Glover; Tina Fey; and "Killer Mike." Tr. 1127 (Logan).

Amazon ran a two-phase campaign in response to the Union's campaign and messaging. Phase 1 of the campaign began on January 10, 2021 and lasted four weeks through February 6. During Phase 1, Amazon's Mini-Campaign Owners ("MCOs") led small group meetings with employees and provided facts about the Union and unionization and offered Amazon's position

on those issues. Tr. 1030–32 (Logan). Amazon highlighted a different "theme" during each of the four weeks. Tr. 1051 (Logan).

Amazon instructed the MCOs and consultants on how to engage with employees. Tr. 1033–34 (Logan); Tr. 1086 (Moss). Amazon informed them that their purpose was to provide information to employees and articulate Amazon's position. Amazon instructed the MCOs and consultants not to issue their own, unapproved communications to employees. Tr. 1034 (Logan). Overall, Amazon held hundreds of small group meetings, which lasted about 30 minutes and were each attended by 15 to 25 employees.

Phase 2 of the campaign (the "Get Out The Vote" phase) began on February 8, 2021. During Phase 2, Amazon used MCOs/consultants to engage employees one-on-one about the voting process, to encourage voting, to deliver Amazon's message regarding the Union's campaign, and to note whether employees raised concerns related to the ballot kit so that Amazon could provide that information to the NLRB to help promote voting. Tr. 1031–32 (Logan). The MCOs and consultants also showed employees a sample generic ballot kit and discussed the multi-step process for validly completing the ballots. Tr. 1033 (Logan). Amazon did not use MCOs or consultants to poll employees about whether they supported the Union. In fact, Amazon specifically told the MCOs and consultants not to ask employees whether they had voted, how they had voted, or whether they supported the Union. *Id.*

Amazon communicated with employees through various channels during the campaign. Amazon's communications emphasized the realities of collective bargaining—i.e., that employees could get the same, more, or less, and that there are no guarantees. Tr. 1054 (Logan). Amazon also communicated about how selecting an exclusive representative under federal labor law could limit employees' ability to deal directly with their supervisors and managers on

employment-related problems or issues, at least not without involving the union. Tr. 1111–12 (Logan); Exs. E-59 (Jan. 14, Feb. 2), E-74, E-75, E-76.

Amazon distributed campaign-related "swag" during the campaign. Amazon made "I Voted" Peccy pins available to employees during one-on-one engagements ("Peccy" is an Amazon mascot). Tr. 1087 (Logan); Ex. E-72. Employees were offered pins if they voluntarily shared that they already had voted. Employees were not required to take the pins, nor were employees required to notify Amazon that they had voted to receive the pin. If an employee asked for the pin, the MCO or consultant gave the employee a pin. No one tracked which employees received an "I Voted" pin. Tr. 1088–89 (Logan).

Amazon similarly made "Vote" shirts available in late January/early February. Tr. 1090 (Logan). The shirts were placed on tables inside the facility for employees to take. Amazon did not keep a record of who took a shirt. The shirt's design—"VOTE"—was similar in its messaging and color scheme to the large banners that Amazon displayed on the side of the facility. Tr. 1091 (Logan).

Amazon also made available "Vote No" swag, including a Peccy pin, rearview mirror tags, and lanyard tags—but only during Phase 1 of the campaign. Amazon placed these items on a table in the back of the room where the small group meetings occurred. Employees were allowed to take these materials at their discretion. Again, there was no tracking of who took such materials. Tr. 1092–93 (Logan).

D. In Mid-December 2020, Jefferson County Extended the Maximum Green Light Time Outside BHM1's Main Entrance After Conducting Its Own Time Studies.

In mid-September 2020—well before the petition was filed, and in anticipation of the upcoming October Prime Day and November/December Peak—the LP team requested that Jefferson County conduct a time study of the traffic signal outside the main entrance of the

BHM1 parking lot. Tr. 1249 (Street). "Chime" messages from September 2020 between Amazon LP team members establish the timing and reasoning for the request to Jefferson County. Tr. 1250–52 (Street); Exs. E-57, E-58. Given the number of vehicles that enter and exit the lot each day, parking lot safety is of particular concern to LP and Amazon's leadership team, and LP goes to great lengths to ensure that employees are able to safely enter and exit BHM1 each day. Not having received a response to its request throughout the fall, on December 10, 2020, LP reached Jefferson County Traffic Engineer Kenneth Boozer. Mr. Boozer informed LP that the County was still analyzing a time study performed in September but would complete its review as soon as possible and make any adjustments supported by the data. LP followed up with Mr. Boozer on December 14, 2020 and, the next day, Mr. Boozer and a Jefferson County traffic analyst visited BHM1 to conduct the study. Tr. 1257–58 (Street); Exs. E-83, E-112.

Eventually, in December, Jefferson County, not Amazon, decided to extend the maximum green light time from 35 seconds to 60 seconds "to relieve peak congestion"—and only where the number of vehicles approaching the intersections demands such an extension. Ex. E-113; Ex. U-30(E). Amazon did not tell the County to change the timing in this or any other way and did not provide the County with its metrics. Tr. 1259 (Street). Following the December light change, cars still stopped at the light, and the entire parking lot still was not able to clear out during a single light change. Tr. 1335 (Street).

E. Amazon Has Maintained a Consistent Off-Duty Police Presence in Its Parking Lot Since July 2020.

On July 23, 2020, Street contacted Amazon's security contractor about having off-duty Bessemer police officers patrol the property after an associate brought a gun to the site and pulled it on the security staff. Tr. 1229 (Street). Street made the request for permanent off-duty police coverage in late July 2020, several months before the Union was present outside of the

facility and well before the critical period. Ex. E-54. Starting in late July 2020, off-duty officers were present in uniform in marked vehicles roving the BHM1 parking lot. Tr. 1235–36 (Street). Those officers conducted perimeter checks around the facility's property line—Premier Parkway and Powder Plant Road. The officers looked for anybody encroaching or on the BHM1 property and reported such activity to LP. Tr. 1238 (Street).

Starting around early February 2021, Amazon increased the police presence in the BHM1 parking lot after there was an increase in unauthorized individuals on site. On March 1, a freelance reporter videotaped the parking lot/mailbox tent for over five minutes and posted the video on Twitter. Another freelance reporter also gained access and took pictures on site. Amazon then asked its security contractor for a mobile unit to help patrol the parking lot, but the security contractor rejected the request. As a result of the third-party intrusions, Amazon asked its security contractor to provide a second off-duty Bessemer police officer. The second officer began performing services at BHM1 the first week of February. Tr. 1241, 1313 (Street). The second officer's duties were the same as the first officer's. Tr. 1338 (Street).

III. ARGUMENT

A. The Evidence Showed That None of the Objections Have Merit.

The Board and the courts recognize that "[e]lections, whether won by a company or a union, are not to be lightly put aside." *NLRB v. Monroe Auto Equip. Co.*, 470 F.2d 1329, 1333 (5th Cir. 1972); *accord Safeway, Inc.*, 338 NLRB 525, 525 (2002). Therefore "the burden of proof on parties seeking to have a Board-supervised election set aside is a 'heavy one.'" *Safeway, Inc.*, 338 NLRB at 525 (citation omitted). Proof of misconduct alone is insufficient; the objecting party must provide specific evidence that the conduct might "have changed the outcome of the election in light of the tally of votes." *Frito Lay, Inc.*, 341 NLRB 515, 515 (2004).

"In deciding whether the employees could freely and fairly exercise their choice in the election, [the Board will] evaluate the following factors: (1) the number of the incidents of misconduct; (2) the severity of the incidents and whether they were likely to cause fear among the employees in the bargaining unit; (3) the number of employees in the bargaining unit subjected to the misconduct; (4) the proximity of the misconduct to the election date; (5) the degree of persistence of the misconduct in the minds of the bargaining unit employees; (6) the extent of dissemination of the misconduct among the bargaining unit employees; (7) the effect, if any, of misconduct by the opposing party in canceling out the effect of the original misconduct; (8) the closeness of the final vote; and (9) the degree to which the misconduct can be attributed to the union." *Avis Rent-A-Car Sys.*, 280 NLRB 580, 581 (1986).

The Union cannot satisfy these factors given the facts, law, and final ballot tally. Its main set of objections target conduct that, far from hampering free choice, *made it easier for employees to cast their votes* using a secure USPS mailbox. There is no precedent supporting the Union's attack on this measure to promote voter participation, especially given the lack of any evidence that the mailbox "coerced" anyone into voting or even using that mailbox versus the more than 200 other USPS mailing locations within a 20-mile radius, and also their thousands of home address mailing locations. Nor is there precedent supporting the Union's various other challenges. And where, as here, the objecting party lost by a huge margin, the Union cannot come close to justifying the setting aside of the election. There is simply "no basis" to do so because there is no "evidence that [the objected-to conduct] would have affected the results of the election." *Amveco Magnetics, Inc.*, 338 NLRB 905, 905 (2003). Amazon did not engage in improper conduct and, even assuming it did, there is no basis to conclude the challenged conduct affected the election's lopsided result.

1. The Mailbox-Related Objections (1-7, 17).

A third of the Union's objections attack the USPS's lawful installation of an outdoor mailbox approximately 135 feet away from the BHM1 entrance. Tr. 1210 (Street). The Union cannot overturn an election it lost by over 1,000 votes by attacking something that made voting easier, and there is zero support for this novel argument. The employee witnesses—including the Union's—acknowledged that no one was obligated to use this mailbox instead of the hundreds of other USPS mailboxes near BHM1, *see* Ex. E-77, or their own residential mailboxes. Tr. 143–44, 160 (Richardson); Tr. 240 (Bates); Tr. 476 (Pendleton); Tr. 747 (Woods). And many chose not to use this mailbox, perhaps because the Union's own messaging fostered unfounded paranoia about the mailbox's security. *See* Tr. 143, 160 (Richardson); Tr. 459 (Pendleton); Tr. 747 (Woods); Exs. E-119, E-120. Indeed, the record is devoid of testimony from a single witness that claims that *that* witness actually used the mailbox. Nevertheless, the testimony from two neutral USPS employees proved beyond doubt that the mailbox was completely secure, under USPS control, and within USPS policy. *See* Tr. 855–56, 865–66, 908–10 (Jay Smith); Tr. 1406–15, 1430–32 (Rhoten-Coleman).

The Union's attack on the mailbox makes no sense as a ground for overturning this election, which again would require "evidence that [the mailbox] would have affected the results of the election." *Amveco Magnetics*, 338 NLRB at 905. But there is no evidence—none—that any employees opted *not* to vote because of the mailbox. The evidence shows that the mailbox only made voting easier. While many employees, at the Union's urging, may have opted to drop off their ballots at another mailing location, the Union identified no employee who claimed to have abstained from voting altogether because of the placement of this one mailbox. Nor would any such assertion be plausible, since it is undisputed that employees could and did mail ballots at numerous other locations in the general vicinity.

So, to establish that the mailbox had an effect on the election's outcome, the Union's theory has to turn on the employees who did vote. Even for them, though, such a theory just does not work. For those who declined to use this mailbox and cast their votes using a different mailbox instead—whether because of the Union's own messaging or for other reasons—the Union has no argument. Nor does the Union have an argument for employees who used this mailbox to cast the same votes they otherwise would have cast using another mailbox. It is also hard to fathom any argument centered on the hypothetical segment of employees who would not have voted at all without the mailbox. "[E]nsuring maximum voter participation" is not just Amazon's goal, but the Board's goal too. *In re Baker Victory Servs., Inc.*, 331 NLRB 1068, 1070 (2000).

The Union's theory must therefore be that the mailbox somehow tricked hundreds of employees into switching from supporting the Union to opposing it—even though there is little evidence of anyone using the mailbox at all. It is hard to understand, as a matter of human psychology, how a mailbox could have such power. More importantly, there is no evidentiary support for such speculation. The record contains no evidence of anybody purportedly being dissuaded from supporting the Union or duped into voting against the Union because of the mailbox, the privacy tent around it, or the banner hanging outside the tent. And it is unfathomable that such dynamics—were they supported by a shred of evidence—could put a dent in the Union's more than 2-1 margin of defeat and deficit of more than 1,000 votes. *Cf. Amveco Magnetics, Inc.*, 338 NLRB at 905 (overruling objection to conduct that could not "have influenced enough employees to affect the results of the election, which the Petitioner lost by 10 votes and a nearly 2-1 margin").

Nor is there any colorable argument that asking the USPS to provide an ordinary mailbox violates the Acting Regional Director's D&DE. The D&DE says nothing about how incoming or outgoing mail at BHM1's facility should work—presumably because such practices are within the USPS's jurisdiction, not the NLRB's. Amazon knows of no authority that would permit the Board to unilaterally regulate a matter—like mail collection—that so clearly falls under another federal agency's purview. *See S. Steamship Co. v. NLRB*, 316 U.S. 31, 47 (1942) ("[T]he Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives."). The Board could not regulate something like mail collection without making its directions explicit. After all, it is a basic principle of administrative law that administrative agency decisions are evaluated based on what the agency says in them, not based on what one might guess the agency meant to say. *See, e.g.*, *SEC v. Chenery Corp.*, 332 U.S. 194, 196–97 (1947). And it is a basic principle of due process that private parties need fair notice of any obligations that the agency wishes to impose on them. *See, e.g.*, *F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 253–54 (2012). Had the D&DE actually prohibited Amazon from working with the USPS to install a convenient and secure mailbox on the grounds of the BHM1 facility, Amazon could and would have objected to such a prohibition in its Request for Review.

But in fact the D&DE did not touch upon whether the USPS could install a mailbox outside the facility's entrance. That is unsurprising because the parties' briefing never broached the subject, either. The closest the briefing came was Amazon's alternative proposal for a mail election in which *the NLRB itself* would install a *ballot drop box* at BHM1. Ex. J-4 at 75–76; *see also* Ex. J-5 at 46 & 46 n.25 (arguing that the Acting Regional Director erred by declining to accept, among other things, Amazon's request that the "NLRB place a mail-ballot drop box at

BHM1"). The D&DE did not address NLRB installation of a drop box (or any of Amazon's proposals to increase turnout in a mail-ballot election). There is *not a single word* in the D&DE concerning that proposal, let alone any rationale for rejecting it that would extend to the USPS. Separately, the D&DE did reject conducting a *manual* election on the ground that "[t]he use of equipment clearly belonging to the Employer, such as pass-through boxes or vending machines" that would have permitted contactless ballot distribution, "implies a problematic amount of Employer involvement in election proceedings." Ex. J-1 at 3, 9. This passage, however, clearly relates to a manual and not a mail-ballot election, because Amazon proposed a "pass-through box" and "vending machine style" handout of manual ballots to prevent any possible surface transmission related to COVID during a manual election. *See* Ex. J-1 at 34, 90–91.

Obviously, there was no manual election, and therefore no contactless ballot-distribution equipment. The USPS supplied the mailbox and installed it in accordance with USPS policy. Tr. 904, 913–14 (Jay Smith). It bore no Amazon markings, and there was no indication that it was owned by Amazon, as the Union's first witness conceded. Tr. 152–53 (Richardson). One cannot reasonably infer from the D&DE's silence about an NLRB-installed special ballot box and its rejection of using Amazon-owned ballot-distributing equipment in a manual election that Amazon was prohibited from requesting a different, independent federal agency to install a regular USPS mailbox to help employees mail in their ballots in a mail-ballot election. Finally, even if the D&DE could be extrapolated somehow to prohibit Amazon from doing anything to assist employees in having a safe and secure location to mail ballots (which Amazon vigorously denies), the appropriate remedy is not to require the administration of another mail election to over 5,800 employees.

The Region also needs to carefully consider the long-term effects of holding that a USPS mailbox on an employer's property is sufficient grounds to overturn a mail-ballot election. The NLRB has ordered almost exclusively mail elections since March 2020. Undoubtedly, mail-ballot elections are going on right now at employers who already have an outgoing receptacle for mail or a USPS mailbox on their property that employees may use to send their personal mail. If the Union's theory is correct that such mail collection locations are impermissible polling locations that warrant overturning election results, employers would be left with the lamentable choice of either having to block employee access to those mail collection locations during the election (a potential unfair labor practice during the critical period) or posting notices warning employees that they are not permitted by the NLRB to mail ballots from these locations, thus risking discouraging voter turnout even more in an election process that the NLRB already recognizes depresses voter turnout. *See Aspirus Keweenaw*, 370 NLRB No. 45, slip op. at 2 (2020).

In short, there is nothing objectionable about Amazon's appropriate and lawful request to the USPS to enhance employees' ability to return their mail ballots. Amazon cannot be faulted for sharing "the Board's goal of ensuring maximum voter participation." *Baker Victory Servs.*, 331 NLRB at 1070; *see also Versail Mfg., Inc.*, 212 NLRB 592, 593 (1974) (noting that elections are to be scheduled "at times and places . . . that will best [e]nsure maximum participation"); *see also* Memorandum GC 20–07, Guidance Memorandum on Representation Case Procedure Changes, at 7 n.10 (June 1, 2020) (recognizing that elections should be scheduled on dates "that enhance the opportunity for employees to vote"). The Union cannot overturn the election on this basis. Having convinced the Acting Regional Director to order a mail-ballot election, even though such elections predictably depress turnout, *see Aspirus Keweenaw*, 370 NLRB No. 45,

slip op. at 2, the Union cannot properly object to a participation-increasing measure, especially where, as here, the conveniently located USPS mailbox was solely controlled by that independent agency. As discussed next, each of the Union's mailbox-related objections falls apart under scrutiny and presents no ground for setting aside the election results.

a. *The Region Should Overrule Objections 1 and 2 Because No Reasonable Person Would Have Believed That the Mailbox Was a Polling Location or That Amazon Controlled the Election Process.*

The Union's first two objections allege that, by covering the mailbox with a tent, Amazon "created the impression that the collection box was a polling location." But the evidence showed that the mailbox was just a mailbox. Visibly identifiable USPS employees installed it in broad daylight, in plain view of BHM1 employees. Tr. 981–84 (Harris). After installation, it functioned like a normal mailbox. It had a slot clearly marked "OUTGOING MAIL." Ex. E-5. There were no NLRB election officials or party observers stationed around it, nor any indications that it was an official NLRB voting area. Tr. 150–51 (Richardson). There were no Amazon managers or supervisors stationed nearby, nor any visible signs that Amazon owned or controlled the mailbox. Tr. 152–53, 165 (Richardson). A USPS letter carrier delivered and picked up the mail in a USPS-branded mail truck six days a week. Tr. 1423, 1432 (Rhoten-Coleman); *see also* Tr. 880 (Jay Smith). The mailbox was an "every day" mail delivery and pickup point for the facility, like any other mailbox. Tr. 891, 923 (Jay Smith).

Jay Smith, Director of Enterprise and Key Accounts at the USPS, testified that the mailbox was also fully within USPS policy and the outgoing mail receptacle was exclusively within USPS control. Tr. 913–14 (Jay Smith). He agreed that "it's common to have customers ask for collection boxes" and "not an unusual request for a customer to make." Tr. 902–03 (Jay Smith). And the specifications and installation details were the USPS's ideas and under the USPS's control, not Amazon's. Amazon first approached the USPS about installing a mailbox to

collect outgoing mail on December 22, 2020. Tr. 930 (Jay Smith). Originally, the USPS preliminarily approved installation of a "blue box" collection box, which Amazon would have gladly accepted. Tr. 864, 907 (Jay Smith). But then the USPS determined that a blue box installation would be contrary to its policy because the box was originally expected to be temporary. Tr. 868, 871 (Jay Smith); Ex. U-23 at P-00252. The USPS then came up with the idea of installing a "cluster box unit" modified to accommodate an increased amount of outgoing mail. Tr. 873–75, 878–79, 905–06 (Jay Smith); Ex. U-27. This equipment was an "old box . . . already in the Postal Service's inventory of equipment." Tr. 904 (Jay Smith).

Although originally proposed as a temporary measure, the USPS eventually decided to make this mailbox the "permanent place for delivery every day of mail and outgoing mail" because it provided "a secure, more efficient way, long-term, that benefited the Postal Service" in comparison with the earlier practice of delivering mail inside the BHM1 facility. Tr. 879, 883, 891–93, 907–08 (Jay Smith); Ex. U-23 at P-00251. The USPS, not Amazon, had final say over the location for the mailbox. Tr. 925 (Jay Smith); Tr. 977–78 (Harris). The USPS retained control over the keys to the unit, and Amazon had no key and no access to the outgoing mail compartment. Tr. 908–10 (Jay Smith); Tr. 988–89, 993–94 (Harris); Tr. 1406–11 (Rhoten-Coleman). It only had access to incoming mail delivered to incoming mail compartment #1. Tr. 987–89 (Harris). Indeed, Tanula Rhoten-Coleman, the USPS Safety Manager for Alabama and Officer in Charge for Bessemer, Alabama through the month of February 2021 (the mailbox was installed on February 4, 2021), agreed that the "BHM1 parking lot mailbox is as secure as any United States Postal Service mailbox in the Bessemer area." Tr. 1414 (Rhoten-Coleman).

Given the clear, consistent, and unequivocal testimony of the Amazon and USPS witnesses, Kevin Jackson's unsolicited testimony that Allied Security guards had keys to the

mailbox and opened the "1P" receptacle is not credible. *See* Tr. 811–17, 823 (Jackson). Amazon never had the arrow keys (which act as master keys for USPS drivers) or the special package key to the 1P receptacle (which stays in the lock once used to open the 1P door). Similarly, the Allied Security guards never had any key to the mailbox. Tr. 948–49 (Jay Smith); Tr. 985–86, 988–89, 993–94 (Harris); Tr. 1226–28 (Street). Jackson's testimony is also not credible for additional reasons: He said he saw the security guards open the mailbox "towards the end of January," Tr. 813 (Jackson); but the mailbox was not installed until February 4, Tr. 981 (Harris). He testified that he had never gone into the tent to see the mailbox, that it was dark, that he was in his car in the third row back from the mailbox, and that a heavyset man was standing in front of the mailbox to open it, Tr. 816–17, 824–26, 831 (Jackson); but he could not have had a decent view of what was happening inside the tent from that vantage point. *See* Tr. 1219–20 (Street); Ex. E-53. In addition, Jackson "always parks in the handicapped spots," not the third row back from the mailbox, and from the handicapped parking spots, Jackson would have had no view into the tent. Tr. 1221 (Street).

Nor were employees under any obligation to use the purely optional mailbox. Tr. 1123–24 (Logan). Because Amazon "wanted [employees] to be aware of all the options to securely mail their ballot," Tr. 1121 (Logan), it sent a text message notifying employees that there were many locations where they could mail their ballots by linking to the USPS website. Tr. 1120–22 (Logan); Exs. E-1, E-77. Even the Union's witnesses agreed that using the mailbox was simply "an option." Tr. 476 (Pendleton). It was "somewhere that you can vote if you felt like you did not have a place to vote, or you didn't know where to vote," Tr. 283 (Ashford), "don't have time to go to the post office," or "live in an apartment" such that it is "hard to mail mail," Tr. 476 (Pendleton). The mailbox was there "to make it convenient for people" to return their ballots.

Tr. 734–35, 739 (Woods). Employees were not required to use the mailbox, and often they did not use it. Tr. 141–45 (Richardson); Tr. 459, 476 (Pendleton); Tr. 747 (Woods). Numerous witnesses acknowledged that employees received a text message from Amazon informing them that the USPS had installed a secure mailbox outside the facility's entrance, that "[o]nly the USPS has the key to access the outgoing mail," and that they could find their "closest post office or secure mailbox" by clicking a provided link to a USPS website. Tr. 145–46, 149–50, 153–54 (Richardson); Tr. 361–62 (Wallace); Tr. 424–25 (Bibbs); Tr. 474–75 (Pendleton); Tr. 831–32 (Jackson); Ex. E-1. While Amazon appropriately recommended the use of a secure USPS mailbox as a general matter, it did not tell employees they had to use the mailbox outside BHM1. Tr. 149 (Richardson); Tr. 240 (Bates); Tr. 476 (Pendleton); Tr. 747 (Woods); Ex. E-3; Ex. U-7. Nor did Amazon try to limit access to the mailbox (or any mailbox) based on how employees were going to vote: an employee could use the mailbox to mail in a vote regardless of how he or she voted. Tr. 240 (Bates); Tr. 1123 (Logan). An employee also could have used the mailbox to mail any piece of personal mail. Tr. 878–79 (Jay Smith); Tr. 1334–35 (Street). "The company did not monitor the USPS box there to see whether [employees] were voting or not," "did not maintain a list of any kind" about who used the mailbox, and did not even have the means to do so had it wanted. Tr. 1123 (Logan).

In short, Amazon cannot have misled voters into thinking that the mailbox was somehow an NLRB manual polling location, an NLRB collection box, or a mandatory voting site. Nor was that Amazon's intent. Tr. 1182 (Logan). Amazon told employees that the box was what it looked like—a secure USPS mailbox—and made clear that it was just one of many options for securely mailing their ballots. No reasonable voter (much less hundreds of them) could have been confused or coerced in any way that could plausibly justify setting aside the election.

Nor is there merit to the Union's conjecture that the mailbox "interfered with the NLRB's exclusive control over the election" and created the misimpression that Amazon "had control over the conduct of the mail ballot election." Normal NLRB elections take place on an employer's premises all the time, without creating any suggestion that the employer is in control. That is true even where the employer posts signs on its premises advocating that employees vote against union representation. Any notion that the USPS's installation of a mailbox or Amazon's hanging of a sign somehow crosses the line is simply unsustainable against this backdrop.[3]

The case that the Union cites in Objection 1—*North American Plastics Corporation*, 326 NLRB 835 (1998)—is wholly inapposite. There, the Regional Director directed that the election be conducted by mail-ballot because the employer refused to let some employees onto its premises to vote. *Id.* at 835. The employer requested review of the Regional Director's determination to conduct a mail-ballot election, and the Board affirmed the Regional Director's decision, finding that "[t]o allow the [e]mployer to insist that the election be conducted on its premises and at the same time dictate which of the eligible voters would be allowed to come onto

[3] While the NLRB has traditionally conducted the vast majority of elections through in-person, Board-supervised elections, the National Mediation Board ("NMB") has long used internet and phone voting for representation elections. In analogous circumstances, the NMB has declined to find that employers' efforts to facilitate voting or give employees options to complete or submit their electronic ballot—including through the use of employer equipment—constituted election interference. For example, in *Delta Air Lines*, the NMB found no impermissible interference despite union allegations that the employer-carrier established "on-site polling places" by "hanging campaign materials and voting instructions in computer work stations" and notifying employees "of their right to vote on company computers if they wanted to." *Delta Air Lines, Inc.*, 39 NMB 53, 68–69 (2011). The NMB emphasized that, based on the record, only a "small number of flight attendants . . . voted on [employer]-owned computers" and that "employees voted where and how they felt most comfortable." *Id.* at 70. The record in this case clearly shows that Amazon employees likewise understood that the BHM1 mailbox—which was USPS equipment, not Amazon equipment—was just one option out of hundreds to mail their ballots to the NLRB. Amazon's written communications never coerced or forced employees to use this one mailbox, and no employee testified that they felt coerced or forced. The Board should therefore find persuasive the NMB's reasoning in analogous circumstances and hold that Amazon's efforts to secure a USPS mailbox and notify employees that it was an optional place to mail ballots are not objectionable conduct that warrants a second election.

the premises to vote would be highly prejudicial and would lead to an impression that it is the [e]mployer, not the Board, that controls the mechanics of the election." *Id.* Such reasoning is irrelevant here. Amazon did not exclude any employees from its premises or the mailbox. In this case, the employer did not hinder but, in fact, facilitated employees' ability to cast a vote. In an era where voting access in mail-ballot elections is becoming more critical, this should be applauded, not cited as grounds to overturn a more than 1,000-vote margin of defeat for the Union.

b. *The Region Should Overrule Objections 3 and 4 Because Amazon Did Not Surveil Employees Using the Mailbox or Create That Impression.*

Objections 3 and 4 allege that Amazon "created the impression of surveillance" and "that it was recording the identity of employees who voted." These allegations are unsupported.

An employer engages in unlawful surveillance when it observes employees "in a way that is out of the ordinary and thereby coercive." *Brasfield & Gorrie, LLC*, 366 NLRB No. 82, slip op. at 5 (2018) (citation omitted). In determining whether an employer's statement or conduct has created an unlawful impression of surveillance, the test is "whether the employee would reasonably assume from the statement [or conduct] that *their union activities* had been placed under surveillance." *Flexsteel Indus.*, 311 NLRB 257, 257 (1993) (emphasis added).

No reasonable employee would think that here. For one thing, and as detailed already, no one had to go near the mailbox to mail in their vote. There were hundreds of alternatives, as Amazon made clear to employees. Ex. E-1. For another thing, Amazon put a tent around the mailbox to protect employee privacy. Even the Union's witnesses admitted that this tent shielded the mailbox from view and that no cameras could see inside. Tr. 164 (Richardson); Tr. 747–48 (Woods). In fact, the testimony established that there are no cameras in the parking lot; there are only cameras 37.5 feet off the ground on the outside of the building, where they have

been since March 2020, before the facility became operational, and none could see into the tent. Tr. 1201–02, 1204, 1210–11, 1218 (Street). Even if Amazon could theoretically have figured out who walked into the tent—something Amazon never tried to do—there still would have been no way to tell whether employees were mailing in their ballots once inside the tent, much less whether they were supporting the Union. Tr. 1218, 1222–23, 1283–84, 1331–32 (Street). In addition, Amazon forbade managers, supervisors, and security guards from entering the tent during the election's voting period. Tr. 990–91 (Harris); Tr. 1225–26 (Street); Ex. E-40.

For these reasons, none of Amazon's conduct amounts to impermissible surveillance, or the impression thereof, under Board law. Merely having outdoor security cameras is not "out of the ordinary and thereby coercive," particularly when the cameras do not reveal whether an employee was voting. *Brasfield & Gorrie, LLC*, 366 NLRB No. 82, slip op. at 5 (citation omitted); *see Mountaineer Park, Inc.*, 343 NLRB 1473, 1484 (2004) (no evidence that supervisor, from his position outside the facility, was able to observe employees' activities at polling area inside the building); *J.P. Mascaro & Sons*, 345 NLRB 637, 639 (2005) (employer's president did not engage in unlawful surveillance, in part, because he had no direct view into the snack room where the polling area was located and "had no way of knowing who was entering to vote and who was entering . . . to eat and drink"). Amazon had no way of knowing who was in the tent, or whether someone was dropping off a ballot, visiting out of curiosity, or paying an electric bill. Tr. 1334 (Street).

Nor did Amazon's preexisting security cameras create the impression that Amazon was monitoring employees who entered and exited the tent. The Board has recognized that "it is neither unlawful nor objectionable to maintain or operate security cameras that happen to record protected activity while operating in a normal, customary manner." *Pac. Coast Sightseeing*

Tours & Charters, Inc., 365 NLRB No. 131, slip op. at 11 (2017) (signs near polling area warning of surveillance cameras were permanent fixtures that employees routinely walked by, "likely paying little heed to them," and did not create impression of surveillance); *Nat'l Steel & Shipbuilding Co.*, 324 NLRB 499, 501 (1997) ("[A]n employer has the right to maintain security measures necessary to the furtherance of legitimate business interests during the course of union activity."). Here, the security cameras have been a part of Amazon's normal operations since before March 2020, long before the election and the mailbox's installation. Most are located over 175 feet from the mailbox. Tr. 1202, 1216 (Street). The closest is located about 127 feet away, but its default long-range view of the mailbox area would be unusable to monitor mailing activity because of a lack of detail, and its zoomed-in view would be equally unusable because of excessive pixelation. Tr. 1212–15 (Street); Exs. E-49, E-50. Given the distance, and the opaque tent between the mailbox and the cameras, no objectively reasonable person would think that he or she was being watched. *Cf. Lowes HIW, Inc.*, 349 NLRB 478, 479 & n.7 (2007) (rejecting as "unsupported" conclusion by hearing officer that employer "created the impression of surveillance" when its employee drove voters in golf cart from parking lot to voting site, held the voting-site door open for them, and told them to "have their votes ready," all while wearing an anti-union t-shirt). Indeed, the potential impression of surveillance here is far less than the impression that could exist in a typical in-person, manual election because the USPS mailbox at BHM1 was just one of more than 200 secure mailbox options (and thousands more private options) for employees to use to mail in their votes.

c. *The Region Should Overrule Objection 5 Because Amazon Did Not "Poll" or Observe Employees Entering and Exiting the Mailbox Tent.*

Objection 5 alleges that Amazon "engaged in polling by urging employees to bring their ballots to work and to use the collection box to vote and then observing which employees

complied by entering and exiting the tent around the collection box to vote," which supposedly "created the impression that the secrecy of the ballot had been compromised." This objection is flawed both factually and legally.

Factually, the record does not support the Union's claim that Amazon specifically urged employees to use the mailbox outside BHM1. Amazon appropriately encouraged employees to vote and to personally place their ballots in a secure mailbox to ensure the Board received them by the deadline. *See, e.g.*, Ex. E-1 ("We want everyone to vote in this election and are urging all Associates to mail their ballots in a secure mailbox and to mail their ballots themselves."). Amazon did not say that the *only* secure mailbox was the one outside BHM1. It specifically pointed to the USPS website so employees could "find [their] closest post office or secure mailbox." *Id.* One Union employee witness admitted that no one ever approached her about using the mailbox, Tr. 216 (Bates); an Amazon consultant testified that he mainly encouraged use of USPS blue boxes, Tr. 1375–76 (Moss); and many witnesses admitted that the mailbox was simply an option, Tr. 141–45, 160 (Richardson); Tr. 240 (Bates); Tr. 459, 476 (Pendleton); Tr. 747 (Woods).

Legally, even if Amazon had waged an aggressive campaign in favor of using this one mailbox, that still would not amount to impermissible *polling*. Polling consists of trying to gauge employees' support for or opposition toward the union. *See, e.g.*, *Struksnes Constr. Co*., 165 NLRB 1062, 1062 (1967) ("[A]ny attempt by an employer to ascertain employee views and sympathies regarding unionism generally tends to cause fear of reprisal in the mind of the employee if he replies in favor of unionism and, therefore, tends to impinge on his Section 7 rights."); *Barton Nelson, Inc*., 318 NLRB 712, 712 (1995) (objectionable polling occurs where "the employees are forced to make an observable choice that demonstrates their support for or

rejection of the union"); *infra* Section III.A.3.a. Advocating use of a mailbox—which is equally capable of mailing votes for or against the Union—is not remotely like polling. And again, Amazon did not track who walked into the tent and had no way of knowing what, if anything, was being dropped in the mailbox. The process that would be required to track an individual employee through multiple camera angles and then contact them about whether they had in fact voted, would have been impossible: the two LP employees who had access to the camera feeds, for example, were located 300 feet from the employee entrance. Tr. 1190 (Street). The Union's unfounded surveillance objections are no more successful when framed in terms of supposed polling.

d. *The Region Should Overrule Objection 6 Because Amazon Did Not Engage in Impermissible Electioneering.*

The Union's sixth objection claims that Amazon "electioneered near the collection box" because there was "a central campaign message of the Employer printed on at least one side of the tent." In determining whether an employer has engaged in improper electioneering, the Board considers the nature and extent of the activity, whether the conduct occurred within a no-electioneering area, the closeness of the election results, and whether the conduct occurred contrary to an instruction of the Board agent. *Bos. Insulated Wire & Cable Co.*, 259 NLRB 1118, 1118 (1982). The Board has long recognized that "[a]n employer may properly encourage his employees to vote, so long as he limits his encouragement to that end and says nothing which is calculated to influence his employees in the way in which they vote." *Martin Food Prods., Inc.*, 52 NLRB 1131, 1133–34 (1943).

Here, an initial problem for the Union's objection is the lack of any electioneering prohibition in the election notice, much less one that implicated a mailbox. Ex. J-2. As a result,

there is no argument here that Amazon contravened any Board instruction or designation of a no-electioneering area. *See Bos. Insulated Wire & Cable Co.*, 259 NLRB at 1118.

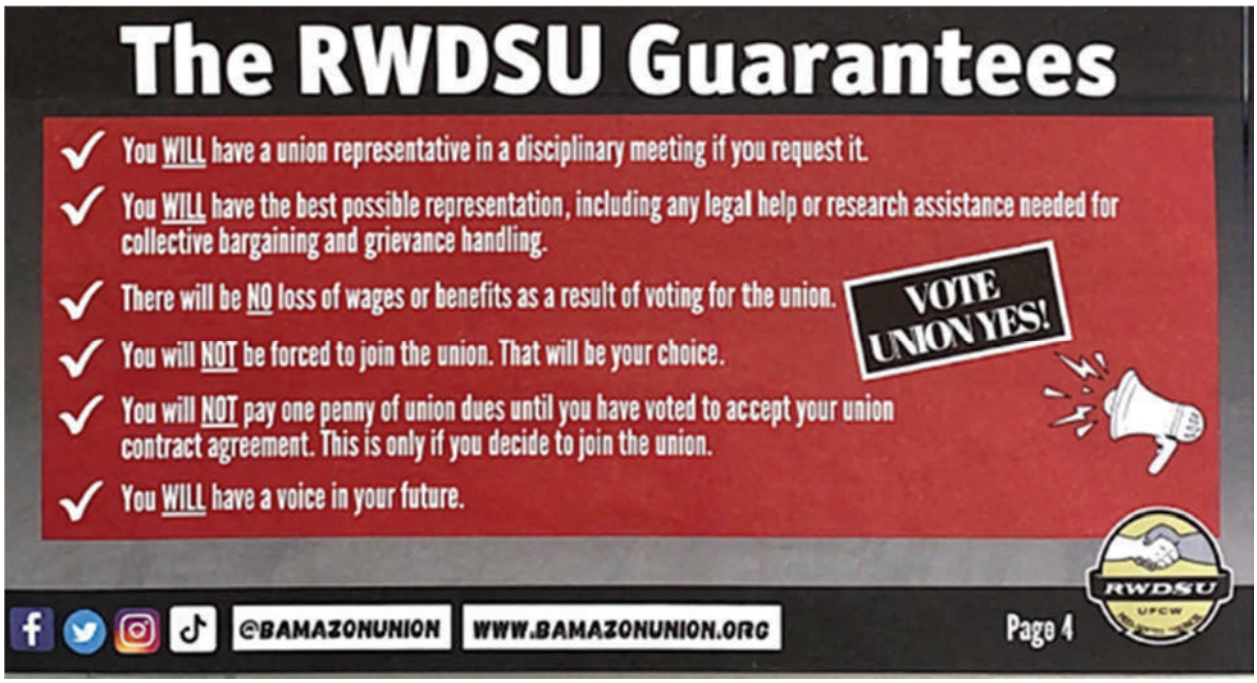
Nor, in any event, do the statements on the outside of the tent come close to objectionable electioneering. The sign on the tent merely encouraged employees to "speak for yourself" and to "mail your ballot here." Ex. E-6. These statements are facially neutral and merely encourage voting. Such signage around a mailbox is not even in the same ballpark as "prolonged conversations between a representative of a party to the election and employees waiting in line to vote," which the Board has treated as improper electioneering in other cases. *See id.*; *see also Milchem, Inc.*, 170 NLRB 362, 362 (1968) (the Board will set aside an election if a party to the election engages in "prolonged conversations" with prospective voters waiting in line to cast the ballots, regardless of the content of the conversation, because they could give a party a "last minute advantage"). As a threshold matter, the *Milchem* standard does not and cannot apply in a mail-ballot election like this one, where there are no voting lines and voting is spread out over the course of seven weeks. Even if some voters used the BHM1 mailbox to mail their ballots, chances are they completed their ballots, enclosed them in the envelopes, and signed the outside well before getting to the tent or seeing the signage. A mailbox is not a polling booth, and *Milchem*'s concerns are inapplicable.

But even if *Milchem* did apply, the Union's evidence fails to establish that Amazon engaged in objectionable conduct. In applying *Milchem* to allegations of improper electioneering, the Board is "informed by a sense of realism" and "guided by the maxim that 'the law does not concern itself with trifles.'" 170 NLRB at 363. Amazon's messaging on the tent was innocuous and encouraged voters to participate and make their voices heard. It is most analogous to a perfectly lawful encouragement to vote for whomever the employees supported.

The Board has repeatedly upheld elections where a party was far more direct in telling employees to vote. *See Lowes HIW, Inc.*, 349 NLRB at 479 (finding *Milchem* inapplicable where employer's agent stood at entrance to manual polling site and told employees to "have their votes ready" because "[t]hese brief statements cannot be considered prolonged conversation encompassed by the *Milchem* rule"); *Royal Coach Sprinklers, Inc.*, 268 NLRB 1019, 1030 (1984) (union's objection overruled because employer did not engage in prolonged conversations under *Milchem* when manager personally informed employees it was time to vote and walked with employees to the polling area); *Amalgamated Indus. Union, Local 76B*, 246 NLRB 727, 727 n.2 (1979) (union observer's "invitation to employees to come in and vote [did] not constitute electioneering"). The sign here presents an even easier case.

While some witnesses testified that Amazon had a "speak for yourself" message throughout the election, that message is consistent with Amazon's uncontroverted objective of maximizing voter participation. *See* Tr. 1032 (Logan) (describing Amazon's "100 percent employee participation" goal based on Amazon's desire for every associate to "have a voice on . . . their future at BHM1"). The Union likewise referred to voting (and petitioning for election) as employees' opportunity to make their voices heard. Tr. 169–70 (Richardson); Ex. E-7 ("On November 20th, 2020 YOUR VOICE was heard. On March 29th, 2020 YOUR VOICE will be

heard again at Amazon in Bessemer, Alabama."). And the Union guaranteed employees: "You WILL have a voice in your future."



Exs. E-7, E-27. Both Amazon and the Union understandably believed that their respective positions better gave employees a voice in the workplace. And all that is consistent with the policies of the National Labor Relations Act ("NLRA" or the "Act"), which include protecting the rights of "full freedom of association, self-organization, and designation of representatives of [workers'] own choosing." 29 U.S.C. § 151 (emphasis added). At most, the meaning of "speak for yourself" is in the eye of the beholder and cannot sensibly be construed as an objectionable sentiment, let alone electioneering. And if it is electioneering in any sense at all, it is merely de minimis and therefore cannot satisfy *Milchem*'s requirement that electioneering be more than a trifle, 170 NLRB at 363. Nor can it plausibly have affected the outcome of this lopsided election. *See Lowes HIW, Inc.*, 349 NLRB at 479 n.6 (finding that even assuming electioneering occurred, it could not have "materially affected the outcome" where it involved a maximum of 30 employees and the union lost the election by 125 votes).

e. *The Region Should Overrule Objection 7 Because Amazon Did Not Engage in Objectionable Ballot Solicitation or Harvesting.*

Objection 7 accuses Amazon of a "campaign to pressure and/or coerce employees into bringing their mail ballots to work and to use the collection box," which allegedly "interfered with employees' free exercise of the right to vote and/or constituted a form of ballot solicitation and/or harvesting." The objection also says this "campaign destroyed the requisite laboratory conditions for an election by creating doubt regarding, and possibly in fact compromising, the secrecy of the ballot."

As with earlier objections, Objection 7 rests on the erroneous premise that Amazon pressured or coerced employees to use the mailbox. There is no evidence for that claim, which is belied by documentary evidence in which Amazon encouraged employees to use any of the several hundred secure USPS mailboxes in the area and by the testimony of many employees (including those who testified for the Union) who agreed that the mailbox was simply an option for employees' convenience. Tr. 141–45, 149 (Richardson); Tr. 240 (Bates); Tr. 283 (Ashford), Tr. 459, 476 (Pendleton); Tr. 734–35, 739, 747 (Woods); Exs. E-1, E-77; *see also* Tr. 1120–24 (Logan).

Nor could the mailbox constitute an attempt by Amazon to "solicit" or "harvest" ballots. While the Board has held that collecting and offering to collect mail ballots constitutes objectionable conduct, *see Prof'l Transp., Inc.*, 370 NLRB No. 132, slip op. at 1, 3 (June 9, 2021); *Fessler & Bowman*, 341 NLRB 932, 932, 934 (2004), nothing like that happened here. Amazon never asked for employees' ballots or had control of them. And there was no reasonable doubt about, or compromise of, ballot secrecy. The evidence confirmed what Amazon told employees: the mailbox was secure and only the USPS had access to outgoing mail, including any ballots that employees chose to deposit into the outgoing mail slot. Tr. 865–

66, 908–10, 952–53 (Jay Smith); Tr. 987–89, 993–94 (Harris); Tr. 1406–1411, 1413–15, 1430–32 (Rhoten-Coleman); *see supra* pp. 14, 20. In other words, the evidence proved to a certainty that Amazon could not, and did not, handle any ballot mailed through the mailbox because Amazon had no access to the outgoing mail. Indeed, Amazon does not know and has no way to discover whether any ballots were even cast at the mailbox. And if they were, Amazon played no role in delivering them to the Board. The mailbox thus did not give Amazon any opportunity "for ballot tampering or for a breach of secrecy." *Fessler & Bowman*, 341 NLRB at 934.

The USPS's installation of the mailbox also does not undermine voters' impression that the Board remained "in complete control of the election process." *Prof'l Transp.*, 370 NLRB No. 132, slip op. at 2. Nothing in "the Board's mail-ballot instructions" (or the D&DE here) prohibits a party from asking an independent government agency to install a secure, general-purpose mailbox. *See id.* at 3. Nor does such an installation equate to a "delegation of an important part of the election process" to someone other than the Board or imply that a party "was acting in some manner for or in concert with the Board official[s] in the conduct of the election." *See id.* at 2 n.6. Even in mail-ballot elections, the Board's responsibilities do not encompass installing general-purpose mailboxes, and so no voter would expect mailboxes to be part of the Board's responsibilities. And even if there were some colorable argument that Amazon engaged in solicitation, that still would not support setting aside the election results because the Union failed to prove that that the mailbox had any effect on the election's result. *See id.* at 6–7.

f. *The Region Should Overrule Objection 17 Because the Mailbox Did Not Constitute a "Benefit" and, in Any Event, Amazon Is Not Responsible for the Union's Erroneous Message to Employees About the D&DE.*

The Union's last mailbox-related objection, Objection 17, asserts that Amazon "circulated a rumor" before the ballot mailing "that a collection box would be installed for the benefit of employees," to which the Union purportedly responded by telling employees that the D&DE "did not authorize a collection box at the facility." As a result, the mailbox purportedly "undermined the Union's message" and "created the impression among employees that the Employer had the power to override the DDE and confer a 'benefit.'" Supposedly these "actions were done for the purpose of influencing the outcome of the election and [were] reasonably calculated to have that effect."

The Union is mistaken at every turn. First, as discussed already, *supra* pp. 15–17, nothing in the D&DE prevented Amazon from asking the USPS to install a new mailbox at the facility. The parties did not address that possibility in their briefing on election procedures, and the Acting Regional Director had no authority to prohibit a USPS-managed installation of a regular mailbox. Even so, the Union falsely asserted on social media: "THE U.S. GOV'T DIRECTED AMAZON NOT TO SET UP A MAILBOX." Ex. E-120 at 1:41. And the Union told employees that Amazon was "lying" when it told its employees about the mailbox, on the theory that the government had denied Amazon's request. *Id.* at 1:54–2:05. More than that, the Union misrepresented that the Board had told Amazon, "no, we're not going to allow you to have your own box, unaccompanied on your property." *Id.* at 2:26–33. But again, nothing in the D&DE speaks at all to whether Amazon could have its own box, let alone a USPS box. Because the Union blatantly mischaracterized the D&DE by telling employees that it prohibited the mailbox's installation, *it is now estopped from trying to benefit* from any confusion that its own

mischaracterization created. *See, e.g.*, *B. J. Titan Serv. Co.*, 296 NLRB 668, 668 n.2 (1989) (applying "the well-established principles that 'a party to an election is ordinarily estopped from profiting from its own misconduct'" (quoting *Republic Elecs.*, 266 NLRB 852, 853 (1983))). This estoppel principle applies not just to employers but also to unions who seek to use their own misconduct "to manufacture an election objection." *President Container, Inc.*, 328 NLRB 1277, 1278 (1999). That aptly describes what the Union seeks to do here. Besides, there is no evidence that employees here were confused—either about the mailbox or what the D&DE permitted.

In any event, the Board has never held that the government's installation of a mailbox on the employer's property during a mail-ballot election is a "benefit" in any relevant sense. And even if the mailbox were a "benefit" that Amazon "granted" to employees, "[i]t is well established that the granting of . . . benefits during the critical period preceding an election is not per se grounds for setting aside an election. The crucial determinant is whether the . . . benefits were granted for the purpose of influencing the employees' vote in the election and were of a type reasonably calculated to have that effect." *Red's Express*, 268 NLRB 1154, 1155 (1984). It is hard to understand the Union's assertion that facilitating employees' access to a mailbox to return their ballots was done or reasonably calculated to influence the outcome of the election. Again, employees could equally use the mailbox to cast a vote for the Union as for Amazon. It provided a safe, convenient, and secure place to mail their vote—regardless of whether that vote was "Yes" or "No." The Region should overrule this objection along with all the Union's other mailbox-related objections.

2. The Campaign-Communications Objections (10, 19).

A pair of objections asserts that Amazon campaign communications improperly threatened that if the Union won the representative election, employees would lose their benefits

or wages (Objection 10) and Amazon would block access to their supervisors (Objection 19). In fact, Amazon's various campaign communications are examples of the normal sort of campaign communications that employers regularly make and that the Board regularly upholds—even if one views them as "partisan" campaign speech encouraging employees to vote no. Unions generally argue for the opposite—that wages/benefits will go up if employees vote for the union and that they will "speak" for employees in a collective manner should employees vote yes. Amazon's communications on these issues objectively did not cross the line from permissible campaign speech to impermissible "threats" under well-settled legal principles.

a. *The Region Should Overrule Objection 10 Because Amazon Did Not Threaten Employees with Loss of Benefits or Pay.*

Objection 10 asserts that Amazon's agents "threatened employees with the loss of benefits and/or pay if the Union was voted in" and told them "that they should vote no to 'protect' what they have and that the Union could not obtain anything in addition to what the Employer already provided them." This claim lacks merit and fails to show objectionable conduct warranting a rerun election.

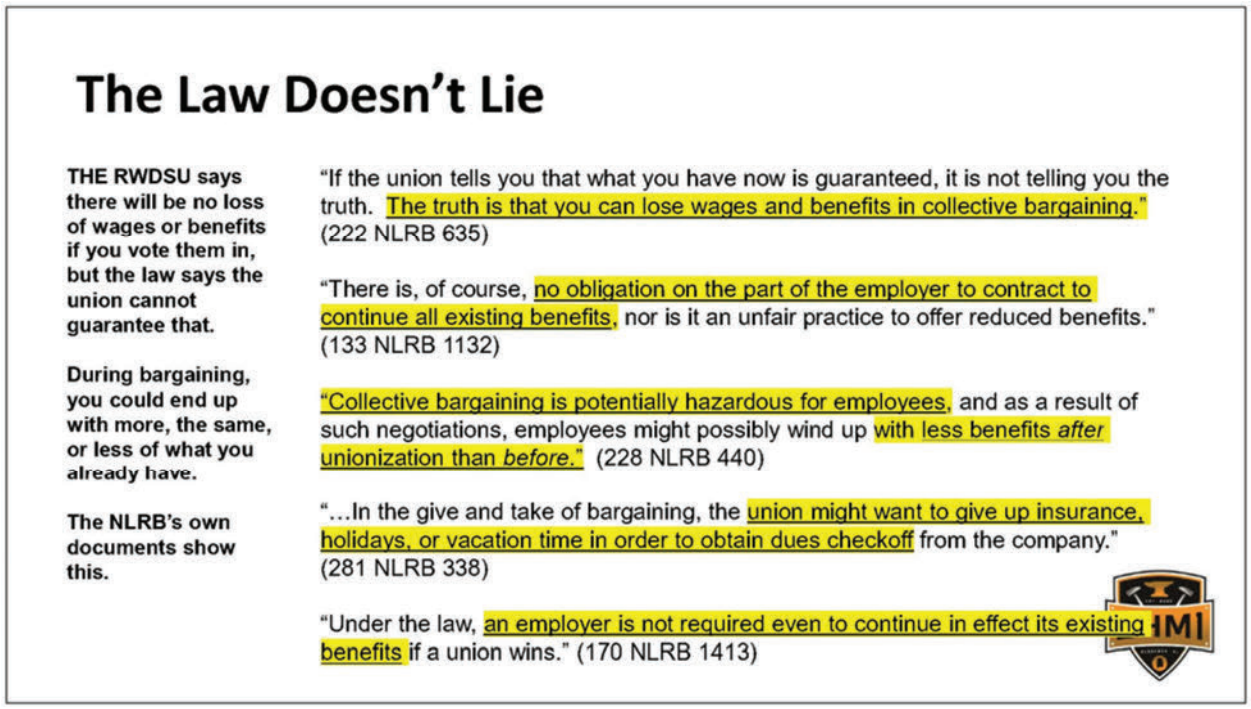
As an initial matter, the Union's objection ignores the governing framework for how the Board evaluates campaign speech after an election. Almost 40 years ago, the Board resolved to back away from its occasional efforts to police the contents of parties' campaign speech after one party has won. *Midland Nat'l Life Ins. Co.*, 263 NLRB 127, 133 (1982). In *Midland*, the Board said it would "no longer probe into the truth or falsity of the parties' campaign statements, and that we will not set elections aside on the basis of misleading campaign statements." *Id.* That rule applies "unless a party has acted in a 'deceptive manner' that renders employees unable to recognize campaign propaganda." *Didlake, Inc.*, 367 NLRB No. 125, slip op. at 2 (2019) (not reported in Board volumes); *see also, e.g.*, *Orchard Manor Alp, LLC*, Case 03-RC-110739, 2014

WL 7149606, at *1 n.2 (Dec. 15, 2014) (finding that *Midland* protected "campaign propaganda predicting what the Employer would do"); *Permanente Med. Grp., Inc.*, 358 NLRB 758, 760 (2012) (determining that a union's campaign "statements suggest[ing] a loss of terms and conditions of employment" were "mere misrepresentations that do not warrant setting aside the election"). This standard is consistent with the Supreme Court's long-standing recognition that, during a representation election campaign, an employer may express its "general views about unionism" or even "specific views about a particular union, so long as the communications do not contain a threat of reprisal or force or promise of benefit." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969); *cf.* 29 U.S.C. § 158(c).

There is no doubt that Amazon availed itself of its right to communicate its views through various channels, including small group meetings, handouts, tabletoppers, car tags, PowerPoint presentations, text messages, A-to-Z app notifications, inSTALLments, GM Insites, ACID screens, and mailers. *See* Tr. 1038–82 (Logan). But these communications were well within legal bounds and cannot justify setting aside the election under *Midland*.

For example, during Phase 1 of the campaign, Amazon MCOs and outside consultants presented Amazon's views of collective bargaining during small group meetings. Tr. 1032 (Logan). In doing so, the MCOs and consultants relied on PowerPoint slides. Tr. 1044, 1076–77 (Logan); Tr. 292–93, 306 (Ashford); Tr 472 (Pendleton); Tr. 507–08 (Bell); Tr. 742 (Woods); Tr. 779 (Thomas). Some of these slides addressed the possibility that employees' benefits or wages may decrease as a result of collective bargaining and stressed the theme that the Union could not lawfully guarantee that unionizing would only improve wages and benefits; instead, "[d]uring bargaining, [employees] could end up with more, the same, or less of what [they]

already have." Ex. E-70 at AMZ_00000244. Quoting directly from Board case law, Amazon highlighted the possibility that employees can lose benefits as a result of collective bargaining:



Id. Throughout the campaign, Amazon did not "take the position or threaten [employees] that it would eliminate or reduce benefits if the Union was voted in." Tr. 1054 (Logan); *see also* Tr. 1350 (Moss). It instead emphasized that employees "could get the same, more, or less when you go into collective bargaining" because there are "no guarantees." Tr. 1054 (Logan); *see also* Tr. 1350–52 (Moss); Exs. E-59 (Jan. 12, Jan. 14, Feb. 2), E-60, E-61, E-62. Amazon also emphasized that no one can "predict the outcome" of collective bargaining in advance, *see* Tr. 1068 (Logan), Ex. E-62 at AMZ_00000050, Ex. E- 66, and that it is "a give and take process," Ex. E-65. And when pressed on cross examination, most of the Union's witnesses had to acknowledge the message that was actually presented, not their subjective reaction to the clear, written position. Tr. 292–94 (Ashford); Tr. 354 (Wallace); Tr. 508 (Bell); Tr. 742 (Woods).

Under the *Midland/Didlake* framework, the truth or falsity of these campaign messages cannot provide any reason to overturn the election. Even outside a representation proceeding, in the context of unfair labor practice charges, these statements would be perfectly lawful under well-settled law: "without an actual or implied threat that employees will lose benefits if they vote for union representation, or that union representation would be futile because the employer will not bargain in good faith with a union, an employer's description of the collective-bargaining process, including the reality that employees may end up with less as a result, does not violate the Act." *Stabilus, Inc.*, 355 NLRB 836, 855–56 (2010). Here there were no statements that employees' wages or benefits would assuredly go down—on the contrary, Amazon acknowledged that they could go up. Nor did Amazon imply that it would not bargain in good faith. All Amazon did was acknowledge the reality "that in the bargaining process wages and benefits can go up, down, or stay the same," which Amazon was fully entitled to do. *La-Z-Boy*, 281 NLRB 338, 340 (1986) (employer did not violate the Act by doing "nothing more than point out that in the bargaining process wages and benefits can go up, down, or stay the same"); *see also, e.g.*, *Wild Oats Markets, Inc.*, 344 NLRB 717, 717–18 (2005) (employer's statement that "in collective bargaining you could lose what you have now" did not violate Section 8(a)(1)); *Hendrickson USA, LLC v. NLRB*, 932 F.3d 465, 472 (6th Cir. 2019) (employer statements that inform employees "about the natural give and take of the bargaining process" are lawful).

Amazon was also entitled "to counter any ideas that union representation would automatically lead to an increase in compensation." *Hendrickson USA*, 982 F.3d at 473. The Union tried to make such guarantees in its own campaign speech, and Amazon expressly presented its response as a counter to that claim. Tr. 1079–80 (Logan); Ex. E-70 at

AMZ_00000244. Indeed, the Union spent massive resources campaigning and also had every opportunity to respond to Amazon's campaign—including during the nearly 50-day period when Amazon alone was forbidden to hold small group meetings after the mailing of ballots. *See* Tr. 1031, 1124–25 (Logan) (describing how Amazon entered Phase 2—the "Get Out The Vote" phase—of its campaign on February 8 because it was no longer allowed to hold small group meetings, even though the Union continued to actively campaign). The Union continued to rely on social media, rallies, politicians, and celebrities throughout the voting period in February and March to get its message out. Tr. 1125–28 (Logan); Tr. 700–01 (Brewer). The Union used these vast resources to counter Amazon and claimed it lost because it did not campaign fast enough, feeling it "just needed a little more time" to win. Tr. 708–09 (Brewer); Ex. E-36 at AMZ_00000583 ("I just think when you're talking about a campaign of 5,800 workers, four to five months was not quite enough time. We just needed a little more time. . . . If there wasn't as huge early turnout in early February, before we can really get the messaging out, once we had contact information, then we could win."). In this way, the election followed "a vigorous campaign on the part of both the Company and the Union," and "the Union's objections in the instant proceeding should be viewed in light of these background facts because the ultimate issue is whether a free and fair election was conducted when considering the totality of the surrounding circumstances." *Fiber Indus., Inc.*, 267 NLRB 840, 842–43 (1983). Even if there were "a few isolated incidents" of objectionable conduct—and the record does not support even that—they could not have affected "an election that the Union lost by over [1,000] votes." *Id.* at 843.

That is particularly true given the well-settled principle that all of Amazon's campaign statements must be viewed in the context of its campaign messaging as a whole. *See, e.g.*, *Flying*

Foods Grp., Inc., 345 NLRB 101, 105–06 (2005) ("Employer statements must be viewed in context and not in isolation[.]"). Contrary to Objection 10's claim that Amazon told employees "that the Union could not obtain anything in addition to what the Employer already provided them," Amazon repeatedly acknowledged that wages and benefits could go up through the give-and-take of collective bargaining or could go down or remain the same. *See* Tr. 1054–59 (Logan); Exs. E-59 (Jan. 12, Jan. 14, Feb. 2), E-60, E-61, E-62, E-64, E-65, E-66. Viewed as a whole, as they must be, Amazon's campaign communications were not threatening, coercive, or otherwise objectionable.

b. *The Region Should Overrule Objection 19 Because Amazon Did Not Threaten Employees with Loss of Supervisor Access When It Communicated Its Legal Position on How an Exclusive Agent Restricts Direct Dealing with Employees.*

In a similar vein, Objection 19 accuses Amazon's agents of having "threatened employees that they would lose access to their supervisor and that supervisor would not be able to help them individually if the Union was voted in." This accusation likewise fails under the *Midland/Didlake* framework. The question of whether employees needed the Union as their "collective" voice in the workplace was a central topic for both sides during the campaign. The Union contended that Amazon's employees had no voice. Tr. 306 (Wallace). But Amazon contended that employees already had a voice in the workplace, based on such systems as (1) the Open-Door Policy; (2) the Voice of the Associate board; (3) the A-to-Z app; (4) HR Desk; (5) Employee Resource Center; and (6) Amazon Connections. Tr. 1512–15, 1519–62 (Jena Smith); Exs. E-96, E-97, E-98, E-99, E-100, E-101, E-102, E-103, E-104, E-105, E-106. It was up to the voters—and is not up to the Board—to decide who was right about this dispute. *See Didlake, Inc.*, 367 NLRB No. 125, slip op. at 2.

The Union also cannot attack any of Amazon's campaign statements on the grounds that they were factually or legally inaccurate. It is plain that if a union is selected through a Board election, it obtains Section 9(a) exclusive representative status, and the employer must "deal" only with the union on mandatory subjects of bargaining. *See* 29 U.S.C. § 159(a). Thus, at its core, communications about supervisory access involve a legal foundation and, again, "misstatements" about the law and its consequences are not objectionable. *See, e.g.*, *Didlake, Inc.*, 367 NLRB No. 125, slip op. at 1 ("We find that the Employer's statements to employees respecting their dues obligation are not coercive and do not constitute objectionable conduct even if they contain misstatements of the law."). The only, narrow exception to that principle applies when "a party has used forged documents which render the voters unable to recognize propaganda for what it is." *Midland*, 263 NLRB at 133. Even then, the election will not be set aside because of the substance of the statement but "the deceptive manner in which it was made, a manner which renders employees unable to evaluate the forgery for what it is." *Id.* There can be no argument that this forgery exception applies here. Employees understood Amazon's "don't give up your voice" messaging as part of Amazon's campaign statements. *See, e.g.*, Tr. 123–24 (Richardson); Tr. 196, 224 (Bates); Tr. 453 (Pendleton); Tr. 498–99, 511 (Bell); *cf. Didlake, Inc.*, 367 NLRB No. 125, slip op. at 2 ("[T]he statements at issue were made in the context of conversations with employees during an organizing campaign."). Under *Midland*, then, none of Amazon's campaign communications can support setting aside this election.

And on this topic, too, even unfair labor practice precedent under Section 8(a)(1) forecloses the Union's "threat" contention. Employers are free to "factually advise that representation will change employees' relationship with their employer." *Holy Cross Hosp.*, 370 NLRB No. 16, slip op. at 1 n.3 (2020). The seminal case is *Tri-Cast, Inc.*, 274 NLRB 377, 377

(1985), where an employer letter told employees that electing the union would significantly change the employer and employees' relationship. Rather than continue to "work on an informal and person-to-person basis," electing a union would require the employer "to run things by the book, with a stranger." *Id.* But the Board held that "[t]here is no threat, either explicit or implicit, in a statement which explains to employees that, when they select a union to represent them, the relationship that existed between the employees and the employer will not be as before." *Id.*

This case law also permits "statement[s] that union representation might limit direct access to management." *Holy Cross Hosp.*, 370 NLRB No. 16, slip op. at 1 n.3; *see also Stern Produce Co.*, 368 NLRB No. 31, slip op. at 4 (2019) (statement "that if [employees] chose the Union to represent them, they would no longer have direct dealings with the [employer's] owner and would have to wait until the Union negotiated with him"); *Flying Foods*, 345 NLRB 101, 105–06 (2005); *Hendrickson*, 932 F.3d at 476–77 (statements that "[y]ou'll be giving up your right to speak for and represent yourself," "[r]elationships suffer," and "[f]lexibility is replaced by inefficiency"). Similarly, in *Tesla, Inc.*, 370 NLRB No. 101, slip op. at 9 (2021), the Board upheld a statement by the employer's CEO, in a meeting with two employees, "that if the employees selected the Union as their representative, only the Union would have a voice and not the employees." The Board held that, under *Tri-Cast* and its progeny, such statements were lawful because they "accurately explained that an effect of unionization would be that employees would deal with the [employer] through the Union, which would speak on their behalf." *Id.*

Here, Amazon's campaign statements accurately explained the effect of unionization on the employer-employee relationship well within the limits of Board law. For example, the Union

has highlighted a text message that comfortably fits within the *Tri-Cast* paradigm of describing how the employer-employee relationship would change as a consequence of unionization:

> Don't Give Up Your Voice: If a union represents employees at BHM1 and you have a problem or concern, you cannot go to your manager, you must bring that concern to the union instead. . . . If you're unhappy with that decision, we can't help you. We want to continue to work directly with you, without a third-party between us.

Ex. U-2. The Union also highlighted other campaign messages to similar effect. *See* Ex. U-3 (A-to-Z app communication stating, "We believe that working together directly is the most effective way to understand and improve our workplace. We want to hear from you and work with you directly. Your direct voice matters."); Ex. U-14 (FAQs No. 7: "What if I have a problem? Who do I talk to? If a union gets in and you have a problem, the union will decide whether to bring the issue to management."). Employees also testified that employer representatives made similar statements during a small group meeting that employees would not have a voice if employees voted for Union representation. Tr. 59–60 (Richardson); Tr. 196 (Bates); Tr. 453 (Pendleton); Tr. 498–99 (Bell); Tr. 511 (Bell). But none of these campaign statements qualify as threats under the *Tri-Cast* framework.

And again, those campaign "statements must be viewed in context and not in isolation." *Flying Foods Grp.*, 345 NLRB at 105–06. So even if there were objectionable communications, they would be isolated occurrences that could not justify setting aside the lopsided election results and the Union's own vigorous campaign. *See supra* pp. 40–41; *Fiber Indus., Inc.*, 267 NLRB at 843.

3. The Campaign-Activities Objections (11, 13, 20).

The next set of Union objections raises three challenges to certain of Amazon's alleged activities leading up to and during the campaign period. None of these objections has merit.

a. *The Region Should Overrule Objection 11 Because Amazon Did Not Engage in Improper Polling or Interrogation.*

In Objection 11, the Union charges that Amazon "engaged in an extensive campaign of polling employees and/or interrogating them with respect to their support for the Union thereby interfering with their rights to an election free of coercion and interference." While it is unclear from the objection itself what specific episodes the Union has in mind, what is clear is that Amazon did not impermissibly poll or interrogate voters as alleged.

As noted earlier, objectionable polling occurs when an employer affirmatively inquires into employees' support for or rejection of the union. *Struksnes Constr. Co*., 165 NLRB at 1062 ("[A]ny attempt by an employer to ascertain employee views and sympathies regarding unionism generally tends to cause fear of reprisal in the mind of the employee if he replies in favor of unionism and, therefore, tends to impinge on his Section 7 rights."); *Barton Nelson, Inc*., 318 NLRB at 712 (objectionable polling occurs where "the employees are forced to make an observable choice that demonstrates their support for or rejection of the union"). Similarly, an employer may not interrogate employees about whether they have voted or will vote for or against the union. *See e.g.*, *Bon Appetit Mgmt. Co.*, 334 NLRB 1042, 1050 (2001); *see also Milum Textile Servs. Co.*, 357 NLRB 2047, 2070 (2011) ("For a finding of unlawful interrogation, a supervisor's words themselves, or the context in which they are used, must suggest an element of coercion or interference."). Not all questions regarding a union or an election are considered unlawful interrogation. Single or isolated questions— unaccompanied by threats or coercive statements—are not considered unlawful or objectionable conduct. *See Heritage Lakeside*, 369 NLRB No. 54, slip op. at 3 (2020) (finding that a single question made to an open and active union supporter would not tend to restrain, coerce, or interfere with the exercise of rights guaranteed by the Act and therefore was not unlawful); *Frito Lay, Inc*., 341

NLRB at 517 (finding that a casual, amicable, isolated question and comment was not objectionable coercion or interrogation); *Pony Express Courier Corp*., 283 NLRB 868, 868 (1987) (finding no violation inasmuch as the "single question lacked any intrinsically threatening quality, and the supervisors' passing up of the opportunity to press [the employee] any further on his response to the question made it unlikely that [the employee] would have left the conversation feeling coerced"); *Great Lakes Oriental Prods., Inc*., 283 NLRB 99, 99 n.1 (1987) (finding that a supervisor's question to an employee as to whether employees had signed cards for the union did not violate the Act and emphasizing that the question was "asked in passing," occurred "in the packing area," involved no follow-up, was "isolated," and "was unaccompanied by any statements that would give it coercive overtones").

But the Union failed to show that any such polling or interrogation, let alone systemic polling or interrogation on union support, occurred here. It put forward no evidence that Amazon representatives polled or interrogated employees about whether they supported the Union or made any effort to track such support. At most, it offered one or two instances where employees gave vague testimony along these lines that was not corroborated by other witnesses. *See, e.g.*, Tr. 725–26 (Woods). Even if such isolated occurrences happened, in a voting unit of over 5,800 employees it remains "virtually impossible to conclude that the election outcome [was] affected." *Bon Appetit Mgmt. Co.*, 334 NLRB at 1044 (citation omitted).

Rather than try to prove the allegations in Objection 11, the Union's strategy at the hearing was to shift gears and target Amazon's "Get Out The Vote" efforts in February and March. The Union's witnesses claimed that such efforts sought to, and did, ask employees if they had voted already. But ER Principal Todd Logan testified that he specifically trained Amazon's "Get Out The Vote" employees (the MCOs) and consultants *not* to directly ask

employees about whether they had voted, how they voted, or how they would vote: "They absolutely cannot ask an associate whether they voted. They cannot ask an associate if they voted yes or no. They can't ask an associate if they favor or don't favor the union, you know, if they're pro-union, pro-Amazon, whatever, they can't ask that of [employees]." Tr. 1035 (Logan); *accord* Tr. 1084 (Logan). In addition, the MCOs and consultants never reported back with lists of alleged union supporters (or non-supporters), undermining the claim that they sought to poll or interrogate workers about union support. Tr. 1084–85 (Logan).

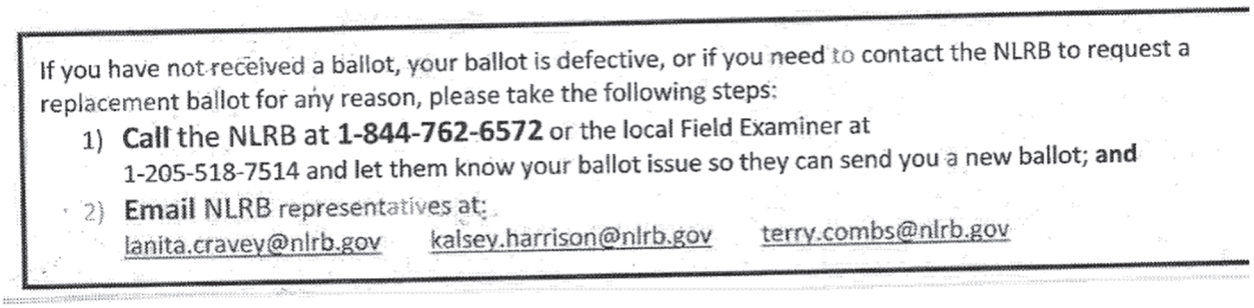
Instead, MCOs' and consultants' energies during Phase 2 of the campaign period—after the Board mailed out ballots—focused on "Get Out The Vote" efforts in nonmandatory one-on-one engagements with individual employees, such as making sure the employee had received complete ballot kits with no pieces missing and demonstrating how the different pieces worked by using sample ballot kits to ensure that the ballots were validly completed (with only a single mark, and no signature on the ballot itself) so that every vote could count. Tr. 1031–32, 1036, 1083–86, 1137–38, 1143–46 (Logan). If the employees reported problems with their ballot kits, the MCOs and consultants contacted the NLRB with several lists before the mail-ballot deadline to assist the NLRB in remedying those issues. Tr. 1143 (Logan). *These activities were fully permissible under Board law*, as the Board has just recently underscored. *See, e.g.*, *Prof'l Transp.*, 370 NLRB No. 132, slip op. at 6 n.22 ("[S]imply asking if employees have received their ballots or offering to assist them with understanding the election instructions could not reasonably be interpreted as ballot solicitation."). And they were part of a much broader and fully legitimate effort to encourage employee turnout. Amazon hung "Vote" banners outside the facility, distributed "Vote" t-shirts, and conveyed numerous neutral messages advocating voting

and explaining how to properly complete the complicated mail-ballot process to avoid invalidation of ballots. Tr. 1033, 1090–92 (Logan); Ex. E-73.[4]

Testimony from one of Amazon's consultants, Bradley Moss, corroborated Logan's testimony. Moss acknowledged that he was instructed not to ask any employees whether they had voted already or how they had voted (or whether they would vote "yes" or "no"). Tr. 1353–54, 1360, 1383 (Moss). Moss did admit that he received daily lists, called on-premise reports, of the roughly 300 employees who were on the premises each day, and that he would mark down on this list whether an employee had voted already *if* the employee volunteered that information and whether he or she had received an intact ballot kit. Tr. 1354–55, 1372–73 (Moss). Moss did not testify that Amazon had asked him to record this information, and he did not provide any evidence that Amazon kept track of his annotations—the most he offered was uncertain testimony that, "as far as [he] could tell," an employee would not reappear on the on-premise report if the employee had previously told Moss he or she had voted, and he admitted that he did not know what Amazon did with his marked-up pages. Tr. 1356, 1385–86 (Moss). Moss did not record how employees had voted when they volunteered such information. Tr. 1355–56, 1361–62, 1381 (Moss). His role was "to make sure folks were receiving their ballots" and "help answer" any questions they had about the process. Tr. 1354 (Moss). If an employee reported

[4] Even with Amazon's extensive Get Out The Vote efforts, turnout in this election was only around 52%. Ex. B-1(a) (showing 3,041 votes among 5,867 eligible voters). That figure is far below the average for mid-pandemic mail-in elections (72.4%) and even below the pre-pandemic average (55%). *Aspirus Keweenaw*, 370 NLRB No. 45, slip op. at 2. Plainly, employees were not coerced into voting based on mail-ballot election turnout averages, and they certainly were not coerced into voting "no."

problems with his or her ballot kit, Moss gave the employee a slip of paper with the Board's contact information:


If you have not received a ballot, your ballot is defective, or if you need to contact the NLRB to request a replacement ballot for any reason, please take the following steps:

1) **Call** the NLRB at **1-844-762-6572** or the local Field Examiner at 1-205-518-7514 and let them know your ballot issue so they can send you a new ballot; **and**
2) **Email** NLRB representatives at:
lanita.cravey@nlrb.gov kalsey.harrison@nlrb.gov terry.combs@nlrb.gov

Tr. 1356–58 (Moss); Ex. E-84. Moss also fielded questions from employees who were uncertain about whether they could sign the back of the yellow envelope with printed letters rather than cursive or about whether the blue envelope went into the yellow envelope, or vice versa. Tr. 1359–60 (Moss). Employees who did not want to talk to Moss did not have to do so. Tr. 1358–59 (Moss).

Several witnesses provided similar descriptions of what the MCOs and consultants were doing in Phase 2. For example, Carla Johnson testified that an Amazon representative approached her and asked if she had received her ballot. Tr. 1758 (Johnson). She responded "yes" and that she had filled it out and mailed it back the same day. Tr. 1758, 1768 (Johnson). The representative did not ask her anything else, including whether or how she voted, and did not write anything down. *Id.* J.C. Thompson testified to having had a similar encounter. Tr. 1791–92 (Thompson). But not everyone even spoke to the MCOs and consultants. Tr. 63–64 (Richardson); Tr. 1779–81 (Lewter).[5] Compared to the Amazon witnesses above, who covered the overall process of the campaign, to what consultants did, and to what employees heard, the

[5] In contrast to these witnesses, some Union witnesses testified that Amazon representatives did ask them whether they already had voted. But even assuming that this testimony is accurate, it shows, at most, some instances of MCOs or consultants violating the instructions Amazon gave them. And the fact that other employees were not asked such questions suggests that these employees most likely misinterpreted the conversations they had or had a subjective reaction different than most employees.

Union's evidence at most shows that on some unspecified but rare occasions, there may have been a handful of problematic exchanges. But a handful of problems does not suffice to overturn a more than 1,000-vote margin.

Amazon's Get-Out-The-Vote activities provide no basis for setting aside the election. The Board has long recognized that "maximum voter participation in Board-sponsored elections is a laudable goal," so long as the parties do not veer into objectionable conduct that "has a reasonable tendency to influence the election outcome." *Ryder Student Transp. Servs.*, 332 NLRB 1590, 1590–91 (2000). Amazon did not veer into objectionable polling or interrogation about union support, or lack thereof, and did not interfere with employees' free choice. Instead, it wanted to make sure that employees did not encounter problems with the ballot kits and could seek redress from the Board if they did have any issues. These efforts were entirely lawful, and also sensible, given the challenges posed by mail-ballot elections. As the Board observed last year, there is "generally lower voter turnout in mail-ballot elections." *Aspirus Keweenaw*, 370 NLRB No. 45, slip op. at 3 n.6. Mail-ballot elections also frequently encounter logistical problems that make it harder for employees to vote, such as employees receiving no ballots, duplicative ballots, or late ballots. *E.g.*, *Nat'l Hot Rod Ass'n v. NLRB*, 988 F.3d 506, 508 (D.C. Cir. 2021) (sustaining challenge to NLRB certification of election results because of problems with mailing of ballots). Amazon shared these concerns here. Tr. 1083–84 (Logan). That is hardly improper or coercive.

The Union may try to compare some MCOs' or consultants' apparent practice of writing down whether the employee already had voted, based on volunteered information, to impermissible recording of employees standing in line, or near the line, to vote in manual ballot elections. *See, e.g.*, *Piggly-Wiggly #011*, 168 NLRB 792, 793 (1967). But the reasoning of such

manual election cases does not extend to administrative list-keeping in a mail-ballot election, much less list-keeping that is consistent with everyday practices in a workplace. For example, in *Am. Nuclear Res., Inc.*, 300 NLRB 567, 567 (1990), the Board refused to adopt a hearing officer's recommendation to set aside an election even though the employer created a "release list" of employees who left the workplace to cast in-person ballots. A supervisor marked off each employee from the list when the employee boarded a van to be driven to the polls. *Id.* The Board reasoned that the employer had legitimate reasons for the list-keeping and that the employees were accustomed to being monitored, and so the list-keeping did not have the effect of coercing employees and was, therefore, not objectionable. *Id.* In such circumstances, "checklists can be a legitimate method of keeping track of employees." *Id.*

Here, as well, objective, reasonable Amazon employees would not have felt coerced by any MCO or consultant clipboards or notepads they observed or knew about. As Jena Smith, Senior HR Business Partner testified, shortly before the critical period, HR employees walked around the facility with a list of employees who had not opted in to use the A-to-Z app notifications. Tr. 1530–31 (Jena Smith). HR employees spoke to those employees at their stations one-on-one to see whether they wanted to opt in to the notifications. Tr. 1531 (Jena Smith). During those conversations, HR employees took notes on their laptops. Tr. 1531–32 (Jena Smith). Because such one-on-one interactions were routine at BHM1, analogous Get Out The Vote activities by MCOs and consultants would not have struck employees as coercive. Nor did any employees testify that they felt intimidated or coerced by those activities.

Besides, unlike employers in cases like *Piggly-Wiggly #011*, Amazon did not undertake systematic efforts to keep track of who voted. The only "list" that Amazon MCOs and consultants used was not a voter list but an on-premises report that changed each day and listed

the several hundred or so employees who were on-site at the BHM1 facility in a given shift. Tr. 1372–73 (Moss); *see also* Tr. 304 (Ashford). Like the *American Nuclear* employees, Amazon employees are accustomed to having their presence tracked at the BHM1 facility—such as by having their badges scanned throughout the day. Tr. 1752 (Johnson). And receiving voluntary information from employees is not objectionable. *See Nat'l Can Corp. v. NLRB*, 374 F.2d 796, 807 (7th Cir. 1967) (setting aside the Board's order and holding that the employer did not commit unfair labor practice and engage in surveillance where employee volunteered information to employer about how particular employees stood on union); *Bridgestone Firestone S.C.*, 350 NLRB 526, 527 (2007) ("An employer does not create an unlawful impression of surveillance where it merely reports information that employees have voluntarily provided."); *N. Hills Office Servs., Inc.*, 346 NLRB 1099, 1103–04 (2006) ("Volunteering information concerning an employee's union activities by other employees such as occurred here, particularly in the absence of evidence that management solicited that information, does not create an impression of surveillance."); *cf. ITT Auto. v. NLRB*, 188 F.3d 375, 394 (6th Cir. 1999) (Kennedy, J., concurring in part and dissenting in part) ("[T]he mere fact that management knew an employee had voted cannot support a finding of intimidation in the polling place.").

For all these reasons, Board precedent prohibiting direct observation and record-keeping of who voted at manual polling sites is inapplicable to this very different context. Even if such information was maintained despite Amazon's instructions to MCOs and consultants not to collect it, there is no "per se" rule against tracking information about voting histories, and each "use of a list containing names of eligible voters must be viewed in its context." *Days Inn Mgmt. Co. v. NLRB*, 930 F.2d 211, 245 (2d Cir. 1991) (denying enforcement of order setting aside election because the "use of a list containing names of eligible voters must be viewed in its

context and may not be considered a *per se* violation of Section 8(a)(1)"); *see also Valcourt Bldg. Servs., Inc. v. NLRB*, 142 F. App'x 668, 672 (4th Cir. 2005) (rejecting "per se rule against list keeping of any kind during an election"). Here, it would be particularly inappropriate to extend doctrine developed in the manual-election context—where there are far fewer legitimate reasons to keep track of information from voters and a condensed/limited period to vote—to the context of a mail-ballot election, where voters have many weeks to vote and can do so (and did) independent of the employer worksite.

In any event, even under the manual-election precedent, the Board will not set aside an election if voters generally "were not aware of potential list-keeping." *RadNet Mgmt., Inc. v. NLRB*, 992 F.3d 1114, 1127 (D.C. Cir. 2021). In this case, some employees saw individuals with notepads and clipboards, but they did not "know if [the consultants were] writing that yes, [they] voted." Tr. 334 (Ashford) ("I couldn't tell you what [they] wrote."). Employees, as mentioned, are very accustomed to seeing managers and others walking around with computers and taking notes. Moreover, other Union witnesses testified that no consultant or Amazon representative approached them about voting. Tr. 382 (Craig) (stating that "[n]obody ever asked" whether he had cast his ballot); Tr. 63 (Richardson) (Q: "[D]id anyone come to you and ask you if you had voted?" A: "No."); Tr. 198 (Bates) (Q: "[D]id anyone approach you about whether you had turned in your ballot or not?" A: "No."). Most employee witnesses testified that they saw only a representative holding a notepad or clipboard but never mentioned any "list." *E.g.*, Tr. 413 (Bibbs) (Q: "[W]as he walking around with a notepad or anything, making notes?" A: "No. He was just walking around."); Tr. 536–38 (Evans) (noting that an Amazon representative had a "pen and paper" but did not know what he wrote down). The record here does not contain persuasive evidence that employees, let alone the vast majority of employees, knew or

reasonably assumed that Amazon was making a list of who already had voted or how they voted. *See, e.g.*, *Indeck Energy Servs.*, 316 NLRB 300, 301 (1995) (refusing to set aside election where there was no "clear" evidence that the petitioner's observer or representative actually kept a list or that the employees suspected that their names were being recorded).

Finally, "even if a party's representative keeps a list of employees who have voted, the conduct is not objectionable unless more than a de minimis number of voters have knowledge of the maintenance of the list." *C&G Heating & Air Conditioning, Inc.*, 356 NLRB 1054, 1054 n.4 (2011). The Board simply will not set aside an election based on list-keeping that had a de minimis impact on the election. *See Robert's Tours, Inc*., 244 NLRB 818, 824–25 (1979), *rev. denied*, 633 F.2d 223 (9th Cir. 1980) (refusing to set aside election where only one voter had seen the list-keeping and where 15 of 26 eligible voters had voted for the union); *Southland Containers, Inc*., 312 NLRB 1087, 1087 (1993) (finding, where "only one or two employees were aware of this [list]," in an election with 34 votes, "any list keeping here would not be sufficient to warrant a new election"). In this case, around 3,000 ballots were cast. The Union has presented nowhere near enough evidence to suggest that what actually occurred at BHM1 "could have affected the results of the election." *Bon Appetit Mgmt. Co.*, 334 NLRB at 1044 (refusing to set aside election despite Section 8(a)(1) violation where "[t]he incident occurred at the employee's regular work station, rather than 'in a locus of management authority'"; the incident was "isolated . . . , especially in the context of the large size of the unit"; there was no evidence of dissemination; and there was a "sharply lopsided vote").

Relatedly, there is nothing objectionable about Amazon's distribution of "Peccy" pins with Amazon's mascot-like character and the phrase "I Voted." Ex. E-72. While Amazon would give out such pins to employees who volunteered in one-on-one engagements that they

had voted, it also gave out pins regardless of whether employees had voted whenever the employees requested one. Tr. 1087–88 (Logan); Tr. 1366 (Moss); Tr. 1845 (Green). There were no lists of people who took these pins. Tr. 1089 (Logan). Nor were there lists of who took "Vote No" Peccy pins or anti-union car tags offered at the meetings in Phase 1 of the campaign. Tr. 1093, 1152–53 (Logan).

b. *The Region Should Overrule Objection 13 Because There Is No Evidence of Impermissible Disparate Treatment.*

In Objection 13, the Union alleges that Amazon and its agents "disparately enforced its social distance policy and interfered with employees supporting the Union from discussing the union organizing campaign." According to the Union, Amazon "permitted its agents and employees classified as process assistants to walk the facility and visit individual employee stations during working time to discuss voting against the Union" but "would discourage or caution employees supporting the Union from talking about the Union during working time." The Union also contends that Amazon "moved employees who it believed supported the union into positions that limited their contact with co-workers during working hours."

These charges are baseless. The Union has identified no disparate enforcement of any social distance policy, nor any disparate policies regarding solicitation or access to voters. As a general rule, of course, employers are under no obligation to permit employees to use their resources at their discretion to campaign, and the Union was not entitled to equal access to such resources or paid time to campaign with its own agents or supporters. *See NLRB v. United Steelworkers of Am., CIO*, 357 U.S. 357, 363 (1958) (holding that an "employer is not obliged . . . to offer the use of his facilities and the time of his employees for pro-union solicitation"). While the Union complains about the process assistants, there is no evidence that they were campaigning at their stations during worktime. And process assistants are voters, not Section

2(11) supervisors.[6] In fact, some employee witnesses even testified that they do not know the process assistants because they "don't really deal with [them]." *E.g.*, Tr. 322 (Wallace) (Q: "Was there process assistants assigned to work your shift in the decent [sic] department on the first floor?" A: "I'm sorry, the process—" Q: "It's in the PA?" A: "To work my shift?" Q: "No, who were the—who were the process assistants that worked, if you remember?" A: "I don't have her name. I didn't really deal with her as much, only during scheduling, so I don't really know her name."); Bibbs Tr. 412 (Q: "Are some of these leaders that you're referring to—are they—do they hold the title of—of processing—process assistant? Do you know?" A: "Not really, I don't think."). The Union has failed to show that process assistants actually received special treatment in their ability to campaign while on the clock or that they were advocating against the Union on behalf of agents of their employer pursuant to authorization or instructions from Amazon.

As for moving employees for allegedly illegitimate reasons, Logan explained that Amazon never devised or deployed such a plan during the campaign. Tr. 1100 (Logan). The witnesses agreed, moreover, that such movement within BHM1 is a common occurrence. Tr. 1100–01 (Logan). Indeed, one Union employee witness testified that "the process assistant role moves around a lot at the facility." Tr. 352 (Wallace). Another Union witness testified that he "originally started on 4. Then went to 2, because I got reassigned to a new supervisor. And then they moved that supervisor to 3. So I've been, kind of, shuffled around a lot lately." Tr. 271

[6] Process assistants do not have "authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action," nor do they actually perform such actions using independent judgment. *See* 29 U.S.C. § 152(11); *see also, e.g.*, *Croft Metals, Inc*., 348 NLRB 717, 721 (2006) (employees classified as "leads" in a manufacturing plant were not supervisors); *Golden Crest Healthcare Ctr*., 348 NLRB 727, 727 (2006) (charge nurses at a nursing home were not supervisors). A "process assistant" is considered a "Tier 3" hourly-paid position. Tr. 1671–72 (Odom). They are themselves supervised by area managers. Tr. 1809 (Thompson).

(Ashford). Another, when asked by the Union's counsel "what floor do you work on," corrected him and said, "[I]t's not a certain floor you work on. It's—you got four flours, so I work on all of them. All depends on which workday they put me on." Tr. 721 (Woods). The same witness, when asked whether it was "unusual" for him to move to the docking side of the building, said "no." Tr. 722 (Woods). And while Darryl Richardson testified that he was relocated to the third or fourth floor, it was not because Amazon wanted to limit his interaction with other employees. It was because his newly assigned Area Manager was on those floors, and nine other employees changed location with him. *See* Tr. 119–20 (Richardson). Simply put, moving employees around the BHM1 facility is the normal course of operations, and the Union has produced no evidence linking routine employee movement to campaign wrongdoing. Besides, the Union has produced no evidence showing that such movements materially impeded employees' abilities to campaign for the Union, regardless of Amazon's purported motives.

c. *The Region Should Overrule Objection 20 Because the Union Presented No Evidence of an Interrogated Employee.*

Objection 20 claims that Amazon "terminated a Union supporter for passing out union authorization cards in non-working areas" and "unlawfully interrogated the employee about his protected activity." The Acting Regional Director determined that the termination allegation must be decided in an unfair labor practice proceeding and held that portion of the objection in abeyance. As for the remaining interrogation allegation, the hearing confirmed that it provides no basis for setting aside the election. Because there is no evidence of any employee being interrogated for protected concerted activity, the Region should overrule the objection.

Even if there were such evidence, it would not support a rerun of the election. As the Board has held, "isolated instances of interrogations or threats" do not justify setting aside an election if there is no evidence that they were "disseminated to the other unit employees" and

"could not reasonably affect the results of the election" given the bargaining unit size and margin of victory. *Werthan Packaging, Inc.*, 345 NLRB 343, 345 (2005) (overturning hearing officer's recommendation to set aside election where the evidence showed "a single threat and at most five interrogations" in a unit of 200 employees where "the Union lost the election by 21 votes"); *Metz Metallurgical Corp.*, 270 NLRB 889 (1984) (overturning hearing officer's recommendation to set aside election that employer won by 24 votes because supervisor's interrogation and threat of a single employee "was de minimis with respect to affecting the results of the election" for a 136-voter unit). Here, the purported interrogation could not have had a material impact on an election involving 5,800 eligible voters and the Union lost by more than 1,000 votes. Board law precludes setting aside the election "based on such a remote possibility." *Metz Metallurgical Corp.*, 270 NLRB at 889.

4. The Traffic-Light Objections (14-15).

Objection 14 contends that Amazon "interfered with the ability of the employees to communicate with Union organizers as they left the employee parking lot," on the theory that Amazon "pressured government officials into changing the timing on a traffic light so as to interfere with efforts by organizers to hand bill and/or communicate with employees as they left the facility." Similarly, Objection 15 claims that Amazon, "acting through local government officials, unilaterally changed policies governing employees exiting the workplace in order to limit the union's ability to communicate with those employees." These objections lack factual support and present no reason to overturn the election.

The evidence on this subject showed that in early September 2020 (well before any petition was filed)—in anticipation of the October Prime Day and the November/December peak season—Amazon's LP team asked Jefferson County to conduct a time study of the traffic signal outside the main entrance of the BHM1 parking lot. Tr. 1249 (Street). Contemporaneous

"Chime" messages from September 2020 between LP team members establish that this request was tied to a business rationale, unrelated to any concerns about unionization, as the light caused backups that prevented cars from leaving the parking lot. Tr. 1250–52 (Street); Exs. E-57, E-58. And when cars were backed up trying to leave the parking lot, that prevented cars coming into the parking lot from being able to park, which in turn made it still more difficult to exit. Tr. 1335–36 (Street). After no response to repeated requests throughout the fall, and with increasing employee complaints about the traffic backups, the LP team followed up with Jefferson County Traffic Engineer Kenneth Boozer on December 10, 2020. Tr. 1254–57 (Street); Ex. E-82. Mr. Boozer informed the LP team that the County was still analyzing a time study performed in September but would complete its review as soon as possible and make any adjustments supported by the data. Tr. 1257–58 (Street); Ex. E-83. Ultimately, the County, not Amazon, determined that the time study data supported extending the maximum green light time from 35 to 60 seconds based on the number of vehicles approaching the intersection. Tr. 1259–60 (Street); Ex. U-30(E). It is undisputed that the LP team's efforts to address this traffic problem did not have "anything to do with the union organizer's presence at that traffic light." Tr. 1260 (Street).

As a result, the County's decision to change the traffic-light timing presents no reason to set aside the election. The issue arose before the campaign, and neither Jefferson County nor Amazon was motivated by the Union's organizing campaign. *See O'Brien Mem'l*, 310 NLRB 943, 943 n.1 (1993) (denying review of regional director's decision to overrule objection because, among other things, it was "undisputed that the conduct involved third parties" and "there [was] no evidence linking the conduct in question to the [union's] campaign"). In third-party cases not involving threats, the Board will overturn election results only where the conduct

at issue so "substantially impaired the employees' exercise of free choice as to require that the election be set aside." *In re Indep. Residences, Inc.*, 355 NLRB 724, 729 (2010); *Rheem Mfg. Co.*, 309 NLRB 459, 463 (1992) (finding that the third-party conduct was not "so coercive and disruptive as to substantially impair the employees' exercise of free choice") (citation omitted). The burden is on the objecting party to meet this standard. *See Mastec N. Am., Inc.*, 356 NLRB 809, 810 (2011).

Here, however, the Union could not possibly meet that standard. It had ample opportunity to campaign, and the change to the traffic light could have only had a negligible impact on its ability to get its message out, especially given that the Union *only had two or three organizers at the intersection anyway*, and sometimes fewer than that. Tr. 603–04 (Brewer). The Union had nearly two months to campaign at this intersection before the County made the change. Tr. 599–600 (Brewer). Even afterward, cars leaving the lot would still stop at red lights (the light would remain green for, at most, 60 seconds), giving organizers the chance to approach and talk to the drivers. Tr. 1262–63 (Street); Exs. E-112, E-113. More than that, the light-timing change only affected traffic turning left at the light to head south on Powder Plant Road; it had no effect on the traffic heading north out of the parking lot because that traffic had a right-turn yield lane and it was always up to the driver whether to turn or yield. Tr. 609, 623–25, 637–38 (Brewer); Exs. E-18, E-22. Both before and after the light-timing change, organizers stood on the concrete median in the yield lane and the other lanes and could talk to any northbound drivers who chose to stop. Tr. 608–09, 617, 637–38 (Brewer); Exs. E-10, E-17, E-22, E-23. The Union also continued to have campaign signs at the intersection. Tr. 641–46 (Brewer). But it had ample alternative means to get its message out, including a nearby tent on Powder Plant Road, Tr. 596–98 (Brewer), and organizers stationed at several of the facilities' other exits, Tr.

602–03, 647–50 (Brewer); Ex. E-4, as well as a high-powered social media and internet communication strategy, Tr. 695–701 (Brewer); Exs. E-35, E-78, E-79, E-80, E-119, E-120. In these circumstances, it is pure fantasy to suppose that the County's change in traffic-light timing had any real effect on an election decided by more than 1,000 votes.

5. The Police Objection (23).

Finally, Objection 23 asserts that Amazon "hired police officers to patrol the parking lot and observe the conduct of employees and union organizers," who supposedly "created an atmosphere of coercion and intimidation." This objection fails as well. The evidence showed that Amazon contracted to station off-duty uniformed local police outside the facility in the parking lot to provide security after July 23, 2020, well before the Union filed its petition, when a BHM1 employee was arrested after drawing a handgun at security personnel. Tr. 1228–33 (Street); Ex. E-54. Later, Amazon requested that the security company provide a second officer after several unauthorized visitors entered the property. Tr. 1241–42 (Street). But throughout the whole time, the officers' responsibilities remained the same, irrespective of the Union organizing effort—other than Amazon's instruction in January 2021 that the officers *end* their practice of occasionally turning on their patrol car lights. Tr. 1240–41, 1243 (Street). Their patrols around the parking lot were nowhere near the places where employees might congregate, and they were stationed far from the mailbox as well and instructed not to stay near any of the tents. Tr. 1223–24, 1243–47 (Street); Exs. E-55, E-56, E-81. Far from intimidating Amazon employees, then, these off-duty officers provided a sense of security in response to bona fide security concerns.

Even during in-person elections, an employer's implementation of security measures does not have a reasonable tendency to interfere with the employees' free and uncoerced choice in an election. *Quest Int'l*, 338 NLRB 856, 856 (2003). That is true even when the security

guard is accompanied by a 90 to 100-pound rottweiler. *Id.*; *cf. Alamo Rent-A-Car, Inc.*, 338 NLRB 275, 275 (2002) (evidence concerning the brief presence of a police officer hired by the employer to act as a security guard at the polling area was too ambiguous to warrant an unfair labor practice finding). By the same logic, the off-duty police officers here (sans rottweiler) could not have affected voters. In fact, that conclusion follows with even greater force for this election, which featured off-site, mail-in voting. Even for those voters who made use of the BHM1 mailbox, moreover, the evidence showed that the off-duty officers were stationed nowhere near the mailbox. Tr. 1243–44 (Street); Ex. E-55. Like the Union's other objections, this one provides no ground for overturning the election, particularly given Amazon's overwhelming margin of victory.

B. In All Events, There Is No Justification for Ordering a Second Election.

Even if one or more of the Union's objections had merit, the Region still should reject the Union's plea for a do-over. Under well-settled Board precedent, the Union bears the "heavy" burden of proving that objectionable conduct might "have changed the outcome of the election in light of the tally of votes." *Frito Lay, Inc.*, 341 NLRB at 515; *Safeway, Inc.*, 338 NLRB at 525. A variety of factors are relevant to that question, including not only the number and severity of the instances of objectionable conduct, but also the likely effect on voters in light of the objecting party's own campaign and the closeness of the final vote. *Avis Rent-A-Car Sys.*, 280 NLRB 580, 581 (1986).

As discussed throughout this brief, these factors cut strongly against the Union. The Union failed to prove that any objectionable conduct was disseminated widely throughout the expansive, nearly 6,000-employee electorate. It waged an extensive pro-unionization campaign backed by vast resources throughout a long campaign period. It affirmatively misled voters on issues it now objects to, such as the security and legality of the BHM1 mailbox. It consistently

claimed that its campaign would be victorious, never alleging that any of Amazon's actions posed a threat to the prospect of victory.[7] And yet the tallied votes still left it with an over 1,000-vote deficit and 2-1 margin of defeat. In these circumstances, even if the Union advanced some meritorious objections, the objected-to conduct still "could not have affected the election." *Flamingo Las Vegas Operating Co., LLC*, 360 NLRB 243, 247 (2014). Without proof from the Union to the contrary, the election results must stand.

IV. CONCLUSION

For the foregoing reasons, the Regional Director should overrule the Union's objections, reject the Union's request to set aside the election, and certify the election results.

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Respectfully submitted,

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[7] For example, the Union's Tweets to employees and other Twitter followers reveal that the Union believed and claimed—both on February 2, 2021, and March 22, 2021, well into the campaign—that "[BHM1 workers] are standing strong and voting #UnionYes!" Exs. E-79, E-80.

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the Employer's Post-Hearing Brief was filed today, June 11, 2021, using the NLRB's e-Filing system and was served by email upon the following:

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